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S. C.

No. 603 and 604.

Motion to advance.

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Filed April 16, 1900.

Supreme Court of the United States

WILLIAM S. TAYLOR AND JOHN MARSHALL, ... *Plaintiffs in Error,*

vs.

J. C. W. BECKHAM, ... *Defendant in Error.*

603

WILLIAM S. TAYLOR AND JOHN MARSHALL, ... *Plaintiffs in Error,*

vs.

J. C. W. BECKHAM, L. H. CARTER, AND JOHN B. CASTLEMAN, ... *Defendants in Error.*

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The undersigned, being respectively counsel for plaintiffs in error and defendants in error in the above entitled causes, respectfully present to the Court the following statements and requests:

1. Plaintiff in error, William S. Taylor, and defendant in error, J. C. W. Beckham, each claims to be Governor of Kentucky.

Plaintiff in error, John Marshall, claims to be Lieutenant Governor of Kentucky, with the right and power to preside over the Senate of Kentucky; while defendant in error, L. H. Carter, denies this claim, and himself claims to be President *pro tempore* of the Senate, with right and power to preside over said Senate, even though said Marshall be present.

Defendant in error, John B. Castleman, claims to be Adjutant General of Kentucky, under an appointment by said J. C. W.

Beckham as Governor; and this claim is denied by plaintiffs in error.

Each of the above named parties is claiming the right to, and is actually attempting to, exercise the powers of the respective offices severally claimed by them; and thus very great confusion is produced in the State of Kentucky, by reason of the doubts as to which of the persons named has the lawful right to exercise the authority pertaining to the several offices named, all to the great injury and detriment of the people of the State of Kentucky.

Thus, under the Constitution and laws of the State of Kentucky, the Governor of the State, in addition to being charged generally with the duty of seeing that the laws are faithfully executed, is also specially charged with the duty and invested with the power of filling many important offices in the State by appointment, some by original appointment and others by appointment to fill vacancies; and also with the power to issue commissions to many officers, whether appointed by him or elected by the people, and also with the power to issue pardons and to remit fines and forfeitures.

Both plaintiff in error, William S. Taylor, and defendant in error, J. C. W. Beckham, are claiming the right to perform all the functions of the aforesaid office of Governor, and each of them is attempting and has actually attempted to perform many of the said functions, such, for example, as issuing pardons and filling offices by appointment, etc.

Some of the officers of the State recognize the acts of the plaintiff in error, William S. Taylor, as the lawful acts of the Governor of the State, and refuse to recognize similar acts by defendant in error, J. C. W. Beckham; while other officers of the State recognize the acts of J. C. W. Beckham as the lawful acts of the Governor of the State, and refuse to recognize the acts of William S. Taylor as such Governor.

Among other officers whom the Governor is authorized and required to appoint are the officers of the eleemosynary institutions of the State; and each of the said two claimants to the office of Governor has attempted to fill said offices, and some persons recognize the authority of the appointees of one of said claimants to the offices and refuse to recognize those of the other, and *vice versa*. By reason of all these facts and others which might be enumerated, it is of the utmost importance to the people of the State of Kentucky that the question of the right to office involved in the aforesaid litigation should be determined.

2. The questions of law involved in said causes are of very great and very grave interest and importance, involving the nature and extent of the powers of an election Contest Tribunal, and the powers of the Judiciary with relation thereto; and we therefore unite in a further request to the Court to allow each side six hours for the argument of the said causes (they are to be heard together) and three counsel on a side.

LOUIS MCQUOWN,
Attorney for J. C. W. Beckham and others.

HELM BRUCE,
Attorney for plaintiffs in error.

Supreme Court of the United States.

WILLIAM S. TAYLOR AND
JOHN MARSHALL, ... *Plaintiffs in Error,*
vs.
J. C. W. BECKHAM, ... *Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

This case comes before the Court practically on a petition and answer. A demurrer was filed to all of the answer, except a few simple matters contained therein, as to which there is no longer any controversy, and this demurrer was sustained; thus cutting off all opportunity for proof, by admitting the allegations of the answer. There is, therefore, no controversy as to facts, as they appear from the allegations of the petition and answer.

Both the offices of Governor and Lieutenant-Governor are involved, but as most of the questions arising are exactly the same as to the two offices, we will, for simplicity and brevity, speak only of the office of Governor, except where on some point there is a difference between them; in which event we will explain it.

The Constitution of Kentucky, on the subject of the election of Governor, provides that:

> "He shall be elected for the term of four years by the "qualified voters of the State. *The person having the "highest number of votes shall be Governor.*" (Sec. 70.)

On November 7, 1899, William S. Taylor and William Goebel were rival candidates for the office of Governor. At

this time, to use the language of Judge Burnam, of the Court of Appeals of Kentucky (who delivered an opinion concurring in the judgment of that Court), it is admitted "that at the election, under the operation of the statute known as the 'Goebel Election Law,' the entire *election machinery of the State* was in the hands of the friends and partisans of the contestants (Goebel and Beckham); that all of the election officers, *from the highest to the lowest*, were selected by the State Board of Election Commissioners, or by their appointees; that the State Board of Election Commissioners were themselves fellow-partisans of contestants." The election officers here referred to included those who received the votes, those who counted them and those who made the returns.

Under these conditions William S. Taylor received 193,714 votes, and William Goebel received 191,331 votes, Taylor's majority being 2,383. And accordingly on December 9, 1899, the State Board of Election Commissioners issued to Taylor the following certificate, viz.:

"COMMONWEALTH OF KENTUCKY.

"Frankfort, Dec. 9, 1899.

"The undersigned, a Board for examining and canvassing the returns of an election held on Tuesday, the 7th day of November, 1899, for

"Governor

"of the State of Kentucky, do certify, that William S. Taylor received the highest number of votes given for that office as certified to the Secretary of State, and is therefore duly and regularly elected for the term prescribed by the Constitution.

"WILLIAM S. PRYOR, *Chairman*,
"W. T. ELLIS, *Member*,
"————————, *Member*,
"*State Board of Election Commissioners for the Commonwealth of Kentucky.*"

The foregoing facts, as to the vote and the certificate, are alleged in the answer to which the demurrer was sustained (Rec., vol. 1, pp. 16 and 17); and the vote is also shown by the certified vote of the State, by counties, introduced in evidence before the Contest Board by Goebel and Beckham (Vol. 2, p. 176.)

After receiving this certificate Taylor took the oath of office, administered by the Chief Justice of the Court of Appeals; thus becoming on the day of his inauguration the *de jure* Governor of Kentucky, with as clear a title of record as any man ever held; but subject to the possibility that in the future some contest might be inaugurated against him. Immediately upon taking the oath he entered upon the duties of the office, which he has ever since held.

Mr. Goebel having been killed, Mr. Beckham, claiming to be Lieutenant-Governor, with the right to act as Governor by reason of Mr. Goebel's death, brought this action at law, pursuant to a Kentucky statute, to recover the office of Governor. *He does not allege in his petition that Goebel was elected Governor*, but, after stating the issue of the certificate to, and the inauguration of, Taylor, he alleges that the General Assembly thereafter "*adjudged and determined*" that Goebel was elected; and that "upon the adjudication and determination aforesaid . . . . . all the powers and authority of the defendant, William S. Taylor, who had theretofore been acting as Governor of this Commonwealth, immediately ceased." (Vol. 1, p. 5.)

In other words plaintiff states that the election officers showed by their returns that Taylor was elected, and that thereupon he took the oath, and "was inducted into the office of Governor" (Vol. 1, p. 2), but that thereafter the General Assembly "adjudged and determined" that Goebel, and not Taylor, was elected. *And this action is brought to enforce the alleged "adjudication and determination."*

It is proper here to say that there is no dispute over the proposition that in such form of action in Kentucky the plaintiff must recover on the strength of his own title, and not on any weakness of defendant's. (Tilman vs. Otter, 93 Ky., 604; Leeman vs. Hinton, 1 Duvall, 42.)

Taylor, being summoned to answer this petition, pleads his election, his certificate, his inauguration, and his possession of the office, and denies that the General Assembly made any such adjudication and determination as is alleged in the petition, and says the proceeding by which the General Assembly sought to oust him from the office, and to install Goebel therein, was not due process of law, as required by the Federal Constitution.

This defense he makes, not only on behalf of himself, as the claimant of the office, but on behalf of the people of the State, who, in the exercise of their constitutional freedom and liberty, elected him. Speaking on this subject Taylor and Marshall in their joint answer say:

"Par. 3. Further answering herein defendants, W. S. Taylor and John Marshall, say each of them is over forty years of age, has been a citizen and resident of the State of Kentucky all his life, and likewise a citizen and resident of the United States all his life. They say further that, as hereinafter more specifically stated, the said Taylor was, on November 7, 1899, duly elected Governor of the State of Kentucky, and the said Marshall duly elected Lieutenant-Governor for the State of Kentucky by the qualified voters thereof; that each of them afterwards received in due form a certificate to that effect from the State Board of Election Commissioners of the Commonwealth of Kentucky, and each of them thereafter duly qualified as such officers by taking the oath of office prescribed by law therefor, and thereby each of them became charged with an express public trust for the benefit of the people of the State of Kentucky. They say that the proceedings referred to in the petition herein by

which it is alleged that the contests over the offices of Governor and Lieutenant-Governor were tried and determined, and by which it is alleged that the authority of these defendants to act respectively as Governor and Lieutenant-Governor was terminated, were and are utterly void, and of no effect for the reasons hereinafter stated, and if effect be given to them, and these defendants be thereby deprived of their respective offices of Governor and Lieutenant-Governor of Kentucky, and plaintiff, Beckham, be thereby installed in the office of Governor or Lieutenant-Governor of Kentucky, these defendants will be thereby deprived by the State of Kentucky of their property without due process of law, and both they and the people of Kentucky, and the qualified voters thereof, will be deprived of their liberty without due process of law, and will be denied the benefit of a republican form of government, all of which is contrary to the provisions of the Fourth Section of the Fourth Article of the said Constitution and to the Fourteenth Amendment to said Constitution, the benefits of which provisions are hereby specially set up and claimed by these defendants both for themselves and for the people of Kentucky, and the qualified voters thereof, whose representatives and trustees these defendants are." (Rec., vol. 1, p. 15.)

Then again, in speaking of the principle ground upon which Goebel sought to have the General Assembly give him the office, viz.: by the rejection of the entire vote in forty (out of 119) counties of the State, on the ground that the ballots, *furnished by the State*, in these counties were too thin to be legal, the defendants reiterate their appeal to the Constitution, saying:

"Defendants further say that, if the State, after having furnished to its citizens and electors in a number of its counties, official ballots upon which it required them to vote, or not vote at all, in the election of a Governor and Lieuten-

ant-Governor, shall reject their votes, and thus refuse to allow them to participate in the election of such officers, merely because they used, in voting, the ballots which the State required them to use, and if the State shall, thereby and on that account, refuse to allow the persons respectively chosen for the office of Governor and Lieutenant-Governor by the majority of the qualified voters of the State, including those using the ballots aforesaid, to take their seats and perform the duties of Governor and Lieutenant-Governor, and shall in lieu of them seat other persons, then the State will thereby deprive the said citizens and electors, all of whom are both citizens of Kentucky and citizens of the United States, of their political liberty without due process of law, in violation of the Constitution of the United States, and will thereby also deprive these defendants of their property without due process of law, all of which is contrary to the provisions of the Constitution of the United States." (Rec. 1, p. 35.)

Then again defendants repeat the appeal in the following portion of the answer, viz.:

"And defendants further say that if any such pretended meeting of members of the General Assembly was held either on January 31st, or February 2d, at which any action was taken or attempted to be taken on the reports of said contest committees, the said meetings were held secretly, without any notice to any of the Republican members of the General Assembly, and without any notice to either of these defendants that such meeting was to be held, and without any opportunity either to the said Republican members, or any of them, to be present, or any opportunity for either of these defendants to be present at such meeting, at which the said contests were to be heard and determined. And if any such meetings were held, or attempted to be held, on either of

those days, and any determination of either of said contests was pretended to have been had, it was utterly void on account of lack of notice, and opportunity to be present or to be heard, as just herein stated, as well as for the other reasons heretofore given. And to deprive these defendants, or either of them, of their offices by such action, would be to deprive them of their property without due process of law, and would be to deprive defendants and the other people of the State of Kentucky, and especially the qualified voters thereof, of their political liberty without due process of law, and to deny to them the benefits of a republican form of government. All of which is contrary to the provisions and guaranties of the Constitution of the United States, as well as that of Kentucky." (Rec. 1, p. 42.)

Then at the close of their answer, immediately preceding the prayer, defendants say:

"Defendants further say that both the offices of Governor and Lieutenant-Governor are offices created by the Constitution of Kentucky, and therefore not subject to abolition by the General Assembly of Kentucky. And, furthermore, it is provided by the Constitution of Kentucky, that 'the salaries of public officers shall not be changed during the term for which they were elected,' and defendants say they were elected, as heretofore shown, to the offices of Governor and Lieutenant-Governor, respectively, of the State of Kentucky, on November 7th, 1899, for a period of four years each, and then and thereby became entitled to exercise the functions of said offices, and to receive the salaries and emoluments appertaining thereto, which are large and valuable, and were such when they were thus elected; the salary of the Governor being then and now fixed by law at $6,500 per annum; and to take from them their said offices and their said salaries and emoluments by the aforesaid action of said contest tribunals,

would be to deprive them of their property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof." (Rec. 1, p. 43.)

Then again in their second amended answer defendants say:

"Defendants say that the power vested in the Houses of the General Assembly of Kentucky to try contests over elections of Governor or Lieutenant-Governor is judicial in its nature, and is subject to the same limitations and restrictions to which the exercise of judicial power is ordinarily subject; that by the Constitution of the State of Kentucky and also by the Constitution of the United States, especially the Fifth and Fourteenth Amendments thereof, the exercise of absolute and arbitrary power by the State or any part thereof, whereby any person shall be deprived of life, liberty, property, or the pursuit of happiness, including therein the enjoyment of honors and the occupation of positions of public trust and emolument, is forbidden. But defendants say that if effect be given to the alleged decisions by the said Boards of Contest or the said Houses of the General Assembly as to said contested elections for Governor or Lieutenant-Governor, and these defendants be thereby deprived of the offices of Governor or Lieutenant-Governor, and the plaintiff Beckham be thereby vested with the power of Governor of Kentucky, then not only will the people of Kentucky be deprived of their political liberty without due process of law, but these defendants will also be deprived without due process of law of the right to hold the said office of Governor and Lieutenant-Governor, which are both profitable and honorable, all of which is contrary to and forbidden by both the provisions of the State Constitution and of the Constitution of the United States above referred to, and defendants say that if by a

proper construction of the Constitution of Kentucky the absolute and arbitrary power is given either to the Boards of Contest or to the Houses of the General Assembly to take from these defendants the offices of honor, trust and emolument to which they were elected by the people of the State as heretofore alleged, under the false guise of a trial of a contest over said offices, then the said Constitution of the State is itself contrary to the aforesaid provisions of the Constitution of the United States." (Rec. 1, p. 60.)

Thus it will be seen there are two separate rights, distinct from each other and yet allied, over which the pleader invokes the protection of the Federal Constitution, and which he insists are thereby protected. They are as follows:

1. The right of Taylor to hold and enjoy an office of honor and profit, into which he has been duly inducted.

2. The right of the people of the State, as an essential part of their political liberty under a republican form of government, which is guaranteed by the Federal Constitution, to choose their representatives.

   (In connection with the discussion of this right will be discussed the right of the people to speak through Taylor in invoking the protection which is thus sought.)

These two rights are specially set up in the answer, and claimed to be protected by the Federal Constitution; and it is expressly charged that the State of Kentucky, by the alleged action of its General Assembly, enforced by its highest Court, has attempted to deprive those entitled to these rights of the benefits thereof, without due process of law. We know of no court in the land, except this one, which has the power to finally settle these questions.

Speaking of the question of the character of the proceedings which resulted in the alleged "adjudication and determination" which this action was brought to enforce, and which Taylor claims were not due process of law, the allegations of the answer, *admitted to be true*, may be briefly summarized as follows, omitting many matters of detail, viz.:

1. After Taylor had been inaugurated, an agreement was made between Goebel and his managers and a large number of the members of the General Assembly, by which it was arranged and agreed, in advance of the institution of the contest, that he should make the contest, and *they would decide it for him.* An agreement between the judge and one of the litigants, in advance of the institution of the litigation, that the judgment should be in his favor. (Rec. 1, pp. 18 and 19.)

2. After the contest was inaugurated it became necessary under the law to select, by lot, two committees, one to hear the evidence and report on the Governor's contest, and one on the Lieutenant-Governor's. But, instead of selecting by lot, a *trick was resorted to*, by means of which Goebel's managers arranged in advance who the committees should be, and in this way put on the Governor's committee ten Democrats and one Republican, and on the Lieutenant-Governor's committee nine Democrats and two Republicans. (Rec. 1, pp. 24 and 25.)

3. Many of the members of these committees were men who had previously counseled with Goebel, and advised and urged him to make the contest, and were objected to on this ground before both the committees and the General Assembly itself, but still continued to sit. (Rec. 1, pp. 25 and 46.)

4. The course of the committees during their sittings was arbitrary, tyrannical and contradictory. But the details can not be stated here. One example may be given. They heard evidence in great detail as to alleged interferences with a free election in Jefferson county, where Taylor received a large majority; but sustained a demurrer to an exactly similar charge, in Taylor's counter-notice, as to Kenton county, where Goebel received a large majority; and thus cut off all evidence as to that county. (Rec. 1, p. 30.)

5. At the conclusion of the testimony the committee practically refused to hear argument, the following being the facts: The committees had set January 30th for beginning the argument, and had provided that they would sit six hours a day, and allow each side a total of ten hours. On that day, but before the beginning of the argument, Mr. Goebel was shot by an unknown assassin. Immediately the wildest excitement and most intense passion prevailed, with serious danger of mob violence. Certain of the counsel for Goebel warned the counsel for Taylor that, in their judgment, two of the counsel for Taylor (naming them) would be killed if they should appear before the committee to argue the contest. Under these circumstances counsel for Taylor addressed to the committee a communication in writing, setting forth these facts, and asking an adjournment simply to the next day, in order to allow a brief space for the allayment of passion, and consenting at the same time that the whole time thus lost should be taken out of the time allowed them (Taylor's counsel) for argument. But the committee refused the request, and said the argument must proceed that day or not at all; where-

upon counsel for Taylor declined to argue the case; and the committee proceeded immediately to adopt the brief report to which we shall presently refer. (Rec. 1, p. 32.)

To the objections urged against the committee, or Board of Contest, as it is called in the statute, the Court of Appeals in its opinion makes, among others, the following response, viz.:

"*Besides, the Board was only a preliminary agent to "take evidence and report the facts to the General As- "sembly. The Assembly itself finally determined the con- "test.*" (Vol. 1, p. 153.)

In other words, the view of the Court was that it made no difference whether the committee was partial or impartial, fair or unfair; it was really nothing but a commission to take evidence, make an orderly statement of the facts, and report to the General Assembly, where the real trial would take place. And in this connection it also says the question before the *Assembly* was one "requiring evidence for its proper determination". (P. 151.) We must accept this as the true construction of the statute, but it renders of vast importance the remaining objections to this proceeding, as set forth in the answer demurred to, and the substance of which we will now state.

6. *The committee did not return any evidence whatever to the General Assembly—not a line, not a word.* (Rec. 1, pp. 41-43.)

Its *report on the facts* is contained in the following remarkable document, viz.:

"The undersigned, the Board appointed and selected by the General Assembly to determine the con-

tested election of the office of Governor of this Commonwealth between William Goebel, contestant, and William S. Taylor, contestee, beg leave to report that we have heard all the evidence offered by both parties, and we now respectfully report to the General Assembly of the Commonwealth of Kentucky, that in our opinion, William Goebel was legally elected Governor of the Commonwealth of Kentucky on the 7th day of November, 1899, and that he then and there received the highest number of legal votes cast for anyone for the office of Governor of Kentucky at said election; and we therefore respectfully suggest that this report be approved and a resolution adopted by this joint Assembly, declaring the said William Goebel Governor-elect of the Commonwealth of Kentucky for the term commencing the 12th day of December, 1899. We decide that the said William Goebel has received the highest number of legal votes, and is adjudged to be the person elected to said office of Governor for the term prescribed by law.

"G. W. HICKMAN, Chairman.

"Frankfort, Jan. 30, 1900."

Of what wonderful assistance that report must have been to the General Assembly, which was to try this contest! What a wealth of information it contained! "In our opinion William Goebel was legally elected Governor." "He then and there received the highest number of legal votes." A report simply drawn to come within the language of the statute (see appendix); not a word as to the facts upon which this conclusion was reached. Not a word as to how many legal votes they found Goebel to have received, or how many they found Taylor to have received; not a word as to what

the *adjudicated majority* was, whether one, or one thousand, or ten thousand, but simply a quotation from the statute, "the highest number of legal votes." Thus a majority of nearly 2,400 votes in favor of Taylor, returned by officers who were his political opponents, is wiped out by the simple statement that the opposing candidate received the highest number of legal votes, without a word of explanation in aid of the statement, or a line of testimony in support of it. Such was the action of this committee, which, according to the construction of the statute by the Court of Appeals, was really not to decide anything, but "was only a preliminary agent to *take evidence* and *report the facts* to the General Assembly."

7. What then did the General Assembly do, the Assembly, which, in the language of the Court of Appeals, "itself finally determined the contest?" How did it, how could it, determine it? *It had no evidence before it; it had not even a report as to a single fact, but merely a quotation of the language of the statute.* It simply accepted the suggestion of the report, and passed a resolution to the effect that the report "is hereby adopted and William Goebel is hereby *declared to be the Governor of the Commonwealth of Kentucky*." (Rec. Vol. 1, p. 104.)

"The said reports were not accompanied by any statement of the evidence heard by said committees or the grounds of their action or finding, and the members of the General Assembly, if they acted on said reports, acted without any knowledge of the facts as to said contests, and without considering what the facts were, and without endeavoring to form any judgment upon the merits of the said contests, and without even an opportunity to form such judgment, if they had been so disposed; but they acted,

if they acted at all, purely arbitrarily, without knowledge of the facts, and merely because they desired to see these defendants deprived of the offices aforesaid, and to see the said contestants given the said offices, pursuant to the agreement and conspiracy to that effect, which had been formed before said contests were heard or determined, as heretofore stated." (Quotation from answer, Vol. 1, p. 41.)

8. But this is not all. This meeting at which this action was taken, which, in contemplation of law was to be the only real trial of the contest, was *a secret meeting*, and one held *without any notice*, either to Taylor or to Marshall, or to *any of the Republican members of the General Assembly, who composed considerably over one-third of the whole body.* (Rec. 1, p. 42.)

9. It is further shown in the answer that in the taking of proof *before the committee* all of the ten grounds of contest set forth in the notice of contest, *except two*, were practically abandoned by the absolute and total failure to introduce any evidence to support them. The two grounds on which the fight was made are set forth in the next two paragraphs of this brief.

10. One of these grounds was as follows: The State is required by law to furnish to each voter an official ballot. He must vote on this, or not at all. The State does this through its various County Court Clerks; so there is a chance for some variation in the physical appearance or character of the ballots furnished in different counties. It was claimed in the notice of contest that in forty (out of 119) counties of the State the official ballots which the

State furnished its electors, and upon which it required them to vote, and upon which they did vote, *were not legal*, because the paper upon which they were printed was too thin to conform to the requirements of the law; and, therefore, that when the voter marked and handed back the ballot which the State had handed him, the State should have declined to receive it, should have refused to allow him to vote on it, and the entire vote of those forty counties (one-third of the State) should be rejected, and the election given to Goebel, because he received the highest number of votes in the *remaining seventy-nine counties*, after *the State, by its own wrong*, had prevented the people in forty counties from participating in the election. It was not claimed by Goebel that by this the whole election was rendered void, but that, while the people of forty counties were, by the *alleged wrong of the State*, prevented from voting, the people of the remaining seventy-nine counties should be permitted to elect him *Governor for the whole State.* We contend that if this is done then the people of the forty disfranchised counties are deprived *by the State* of that right which is the essential feature of a republican government, viz., the right to choose their own representatives.

11. The remaining ground upon which a fight was made before the committee is very similar in nature to the one just explained. It was charged in Goebel's notice of contest that "the *Governor of the Commonwealth* unlawfully called the military forces of the State into active service in said city (Louisville) and thereby intimidated many people, so that the election in the city of Louisville and county of Jefferson was not

free and equal, but was void." This again, it will be observed, was the *action of the State*, through its Governor, whereby it is claimed the electors of the great county of Jefferson, containing about one-tenth of the voting population of the State (36,140 out of 397,185) should be refused the right to participate in the election, while the remainder of the State is allowed to choose a Governor for them. Furthermore the answer showed there was no conflict in evidence on the subject of the action of the military—no evidence to weigh—and that the *simple uncontradicted fact* was, that a small number of soldiers were held in the armory on the election day, *not being at or near a single voting place while the voting was going on.*

The Court sustained a demurrer to the answer setting forth the foregoing facts, which resulted in a judgment of ouster against Taylor and Marshall, declaring them to be usurpers of the offices of Governor and Lieutenant-Governor, and adjudging Beckham to be entitled to the office of Lieutenant Governor with right to exercise the powers of Governor, on account of the death of Goebel.

Suits in equity had previously been brought by Taylor and Marshall against Beckham and against one Carter, who was claiming to be President *pro tem.* of the Senate, with right to preside, though Marshall was present; in which equity suits injunctions were prayed restraining the defendants from interfering with plaintiffs in their offices. Preliminary injunctions, however, were not asked for, and on final hearing they were, by consent, heard with the case of Beckham vs. Taylor and Marshall, which was a suit for the office. When the Court reached the conclusion that Beckham was entitled to the office, it entered the judgment of ouster heretofore mentioned, and dismissed the petitions in the injunction

suits. (The injunction suits are embraced in the small record, No. 604.)

From the judgments mentioned appeals were taken to the Court of Appeals of Kentucky, where they were affirmed; and then the writs of error from this Court were allowed.

The ground of the decision by the Court of Appeals was, in effect, that the power of the General Assembly in the decision of this contest was absolute; that it could not be made the subject of judicial inquiry; that the Court would conclusively presume that the Assembly did nothing which it ought not to have done, and that it left undone nothing which it ought to have done; in other words, that *the General Assembly can do no wrong.*

Assignment of Errors.

1. The alleged legislative judgment, as upheld and enforced by the judgment in this action, was a mere arbitrary act of the State, and deprives plaintiffs in error of their offices without due process of law; the rights to said offices being valuable rights of honor and emolument, which are protected by the Constitution of the United States, and the Court erred in enforcing such judgment.

2. The alleged legislative judgment, as upheld and enforced by the judgment herein, deprives the people of Kentucky of their right to choose their own representatives, which right is secured by the Federal Constitution in its guaranty of a republican form of government to every State; and deprives them of their political liberty without due process of law. It was arbitrary, without evidence, and without notice, and based on the State's own wrong, and the Court erred in enforcing such judgment.

ARGUMENT.

JURISDICTION.

Unless the Court shall be of opinion that all the questions presented are frivolous, and wholly without substance, as was said in Wilson vs. North Carolina, 169 U. S., 586, and in Hamblin vs. Western Land Company, 147 U. S., 531, then it seems to us the jurisdiction of this Court in the case at bar is beyond question. And it will surely be necessary to consider to some extent the questions presented before they can be pronounced frivolous.

The Revised Statutes of the United States (Sec. 709) provide that:

> "A final judgment or decree in any suit in the highest "court of a State in which a decision in the suit could be "had . . . where any title, right, privilege, or immunity "is claimed under the Constitution . . . of . . . the United "States, and the decision is against the title, right, privi- "lege or immunity specially set up or claimed by either "party under such Constitution . . . may be re-examined "and reversed or affirmed in the Supreme Court upon a "writ of error."

In the case at bar Taylor did, in the State court, claim that he had been elected to the office of Governor of the State, and it was conceded by the pleading of his opponent that he had received the certificate of election from the State Board of Election Commissioners, and had been "thereupon sworn and *inducted into the office* of Governor of the Commonwealth, on the 12th day of December, 1899." (Vol. 1, p. 2.) Thus it was not only claimed, but conceded, that from December 12, 1899, until some time thereafter, he was Governor, with, at least, a *prima facie* valid title to the

office. Beckham, however, sued for the office, claiming that Taylor had lost this right by an alleged "adjudication and determination" of the General Assembly. To this Taylor answered that this alleged action was not an "adjudication" or "determination," but a mere act of tyranny under the form of law, from which there was an utter absence of "due process of law," stating the facts on which he based this claim, and that the office which he claimed was one not subject to abolition by the General Assembly, and the salary of which was not subject to change during his term, and that this salary was fixed at $6,500 a year, together with a right to occupy the mansion as a home for himself and his family, for four years; that these rights were "both profitable and honorable," and that they are such rights as are protected by the Constitution of the United States against deprivation without due process of law. (Rec. 1, pp. 43, 47, and 61.)

Surely there could be no plainer *claim* of a right under the Constitution of the United States; and the decision of the highest State Court was certainly *against it.* It presents for decision the two questions, (1) is the right to an office, of the character here described, whether or not it be "property" according to the most limited sense of that word, such a right as is protected by the Federal Constitution against arbitrary deprivation "without due process of law?" and (2) were the alleged "adjudication and determination," plead by Beckham as the foundation of his action, "due process of law?" The "power to hear and determine" these questions is jurisdiction, and is vested expressly in this Court. Whether or not the position of plaintiff in error on these questions is correct will only be finally known when this Court shall have heard and determined them.

Again, Taylor claims that, as he was the nominee of one of the great parties of the State for the office of Governor, and received the vote of nearly 200,000 electors of the State

for this office, and was actually given the certificate of election and took the oath of office, he has become charged with an express public trust, and has a right to speak for the people of the State, and especially those who voted for him and who believe that he was elected, and who are "real parties in interest" in this controversy, and whose interests will be determined by the judgment herein, but who cannot appear in person and speak; and that he, speaking for them, has the right to call upon the United States as the guarantor of their right to vote and choose their own representatives as an essential part of their political liberty under a republican representative government. And thus speaking he claims that, by the action of the General Assembly, relied on by Beckham as the foundation of his action, the people of the State have been denied the benefit of a republican form of government, as guaranteed by the Federal Constitution, and deprived without due process of law of their political liberty, of their right to choose their own representatives.

These are claims specially set up under the Federal Constitution; and this Court has the power to hear and determine them.

In Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 166 U. S., 226, this Court said:

> "If the right now asserted under the Constitution of "the United States was specifically set up or claimed by "defendant in the State Court the motion to dismiss must "be overruled."

And in Covington & Lexington Turnpike Company vs. Sanford, 164 U. S., 578, 595, where the defendant plead that its property was taken without due process of law, and where a demurrer to its answer was sustained by the State Court, as in the case at bar, this Court said:

> "Where a party specially sets up and claims a right or "privilege under the Constitution or laws of the United

"States, the question of the sufficiency of the allegations "to present that issue is not concluded by the views of the "State Court. In Mitchell vs. Clark, 110 U. S., 633, 645, "this Court said: 'The question whether a plea sets up a "sufficient defense, when the defense relied on arises "under an act of Congress, does present, and that neces- "sarily, a question of Federal law; for the question is and "must be: Does the plea state facts which under the act "of Congress constitute a good defense?' This principle "was approved in Boyd vs. Nebraska, 143 U. S., 135, 180. "We decide, however, nothing more on this hearing than "that upon the facts alleged the demurrer to the answer "should have been overruled; and upon the completion of "the pleadings—unless the plaintiffs elected to stand by "their demurrer—the parties should be allowed to make "their proofs touching the issues involved."

So in the case at bar, the question of whether or not the answer stated facts sufficient to show that the right claimed was one protected by the Federal Constitution, and that the legislative proceedings relied on by plaintiff were not "due process of law," are Federal questions for this Court to determine; and upon the merits of which we will presently speak.

In the case of Boyd vs. Nebraska, *ex. rel.* Thayer, 143 U. S., 135, referred to in the case last cited, Thayer filed an information in the Supreme Court of Nebraska against Boyd who had lately been declared elected to the office of Governor of Nebraska, and had taken the oath and assumed the office. Thayer claimed that Boyd had no right to the office because not a citizen of the United States, and therefore not eligible under the laws of Nebraska to the office of Governor of Nebraska. Boyd in his response claimed that he was a citizen of the United States and was eligible to the office. The Supreme Court of Nebraska held that he was not a citizen of the United States, and was not eligible to the

office of Governor of Nebraska, and accordingly entered a judgment of ouster against him. Thus, it will be observed, the sole ultimate question at issue was that of Boyd's *right to hold this State office of Governor*, though in coming to a conclusion on that subject it was necessary to determine whether or not he was a citizen of the United States.

The case was brought to this Court by writ of error. Mr. Justice Field delivered a most vigorous opinion in which he maintained that this Court had *no jurisdiction* of the case. He said:

"I do not think that this Court has any jurisdiction to "determine a disputed question as to the right to the gov- "ernorship of a State, however that question may be "decided by its authorities . . . . . The fact that one of "the qualifications prescribed by the State for its officers "can only be ascertained and established by considering "the provisions of a law of the United States in no respect "authorizes an interference by the general government "with the State action. Because an officer of a State must "be a citizen of the United States it does not follow that "the tribunals of the United States can alone determine "that fact, and that the decision of the State in respect to "it can be supervised and controlled by the Federal "authorities."

But this was a *dissenting* opinion. The Court in an opinion by Mr. Chief Justice Fuller, concurred in by all the Justices except Mr. Justice Field, held that the Court had jurisdiction. After stating certain conclusions reached by the Supreme Court of Nebraska on the question of citizenship, the opinion of this Court says:

"Arrival at this conclusion involved the denial of a "right or privilege under the Constitution and laws of the "United States, upon which the determination of whether

"Boyd was a citizen of the United States or not depended, "and jurisdiction to review a decision against such right "or privilege necessarily exists in this tribunal. Missouri "vs. Andriana, 138 U. S., 496. Each State has the power "to prescribe the qualifications of its officers and the man- "ner in which they shall be chosen, and the title to offices "shall be tried, whether in the judicial courts or otherwise. "But when the trial is in the courts it is 'a case,' and if a "defense is interposed under the Constitution or laws of "the United States and is overruled, then, as in any other "case decided by the highest court of the State, this Court "has jurisdiction by writ of error."

Accordingly this Court not only maintained its jurisdiction, but reached a different conclusion from the Supreme Court of Nebraska on the Federal question, and *reversed the judgment of ouster* which that Court had entered against Boyd.

So in the case at bar, Beckham, under a Kentucky statute, brings a common law action, claiming the office, and praying for a judgment of ouster against Taylor. He bases his right of action solely on an alleged "adjudication and determination" of the General Assembly to the effect that he was elected. The defendant, by way of defense, appeals to the Constitution of the United States for protection of his right to the office which he claims, into which he has theretofore been regularly inducted, and which he then holds, and also for protection of the right of the people to choose their own representatives and be presided over and represented by persons thus chosen, and them alone, all of which is expressly claimed to be secured by the Federal Constitution and to have been ruthlessly violated by this pretended "adjudication and determination" of the General Assembly.

Whether or not plaintiff in error can maintain these positions is the question for determination; but he makes the claims under the Constitution of the United States, he rests

his defense upon them; the highest court of the State rules against him on them; enters judgment of ouster against him; a writ of error from this Court is allowed; and a "suit" or "case" is presented over which the jurisdiction of this Court seems to us to be unquestionable.

We have thus far said nothing of the merits of the questions involved; we have not even alluded to the consideration of whether they are substantial or frivolous. That must, and will necessarily, be disposed of by a consideration of

The Merits of the Case.

The case naturally divides itself into four principal questions, viz.:

1st. Is the right to such an office as is here involved one that is protected by the Constitution of the United States?

2d. Is the right of the people of a State to participate in an election for a State office, and to be represented by the officer of their choice, and by no other, when such right is given by the State Constitution, a right that is secured or protected by the Constitution of the United States?

3d. If the foregoing questions be answered in the affirmative, then can this Court enforce the provisions of the Federal Constitution by declaring null and void an alleged arbitrary action of the General Assembly of Kentucky, denying those rights, when such action is sought to be judicially enforced?

4th. Was the alleged "adjudication and determination" of the General Assembly of Kentucky, as upheld and enforced in this action by the highest court of

the State, an arbitrary violation of either of those rights by the State of Kentucky?

We will discuss these questions in their order.

I.

The Right to the Office.

The office is that of Governor of Kentucky. It is an office created by the Constitution of the State, which, therefore, cannot be abolished except by constitutional amendment, and none such in this case is alleged. The appointment or election of a Governor is not subject to revocation, nor is the power to suspend or remove him at will lodged in any person or tribunal. His salary, by constitutional provision, can not be changed during the term for which he was elected, except by constitutional amendment; and none such in this case is alleged. The election involved in this case was for a term of four years; and the salary of the Governor is $6,500 per annum, in addition to which he is given the right to occupy, free of rent, the executive mansion, as a home for himself and his family during said four years.

The result of this is that when a man is elected Governor of Kentucky, and takes the oath of office, he immediately becomes entitled to receive monthly a salary at the rate of $6,500 per annum, and to the use for four years of a home for himself and his family, rights of which there is no power lawfully to deprive him, except by impeachment and conviction, or by a constitutional amendment, neither of which is alleged in the case at bar, or by the determination of a contest over his title to it.

It would certainly seem that such a right is worthy of protection, and that a contest over the title to it should only be decided by "due process of law."

It may not be "property" according to the ordinary sense of that term. It is certainly a "right" of some kind or description, and of large pecuniary value, as well as a high honor. It is true it does not, in case of death, pass to the heir or administrator; but neither does a life estate in land or personalty. It is true it can not be sold and conveyed, nor subjected to the payment of debts; but this is often true of an estate in lands, where such limitations are imposed that in case of an attempt at alienation or subjection to claims of creditors, the estate ceases and title passes to another. Neither can the franchise of a railroad corporation be assigned or transferred, except by special leave of the Legislature; yet it is universally conceded to be a right of great value, which produces income, and is assessed by the State at high values and taxed accordingly.

It may be said an officer can abandon his office at will. We are not sure that this is true—of course he can *resign*, if the State consents by accepting his resignation—but suppose it is true, so can a man abandon property; he can absolutely burn it up and destroy it; and he often holds valuable rights which he can terminate at will.

It may be said the law expressly provides for trials of contests over the right to office and makes such determinations final; but so does it expressly provide for the trial of contests over the title to land, and makes such determinations final. But in either case, we submit, the trial must be by "due process of law."

It is difficult to see what it is about the right to such an office, as is here involved, which should withdraw it from that protection against spoliation which surrounds every other right of value.

Of course an office may, by the law, be held *at the will* of some appointing power. And when this is true the appointee cannot legally complain when that will manifests itself by discharging him, any more than one, who holds an estate at

the will of another in land, can complain when his estate is terminated by such person. Such was the case of Parsons vs. United States, 167 U. S., 324, which involved the office of District Attorney of the United States. This Court decided that the office was held absolutely at the will of the President. Hence, when the President removed Parsons he had no legal ground of complaint.

Again, an office may be repealable, or the salary reducible, *at the will of the Legislature;* and wherever this is true the officeholder affected by the exercise of this power has no legal ground of complaint.

But the office in question is not of the kinds suggested. There is here no power to abolish it, no power to reduce the salary, except by constitutional amendment, which is not alleged. There is no power in any one to revoke the appointment, or to suspend or remove the officer, except by impeachment and conviction, which are not alleged. It is true, as heretofore said, that there is provision for the trial of a contest over the right to it, just as there is provision for the trial of a contest over any other valuable right. But that trial must be by "due process of law." Whether or not there was "due process of law" in the proceedings involved in this action we will consider in a later part of this brief, according to the plan of argument heretofore outlined.

That the holder of such an office as is here involved is protected by the law against arbitrary deprivation of his rights, is shown by the words of this Court uttered on more than one occasion.

In the great case of Marbury vs. Madison, 1 Cranch, 137 —great because of the great opinion therein delivered by a great lawyer, and not because of the greatness of the object of the contest—the controversy was over the right of Mr. Marbury to have delivered to him by Mr. Madison, Secretary of State, a commission as justice of the peace for the District of Columbia, which commission had been executed and

made ready for delivery by his, Madison's, predecessor, under an appointment made during a preceding administration. On the subject of the nature of Marbury's right the Court, in an opinion by Chief Justice Marshall, said:

"Mr. Marbury, then, since his commission was signed "by the President and sealed by the Secretary of State, "was appointed; and as the law creating the office gave "the officer a right to hold for five years, independent of "the executive, the appointment was not revocable, but "*vested in the officer legal rights, which are protected* "*by the laws of his country.*

"To withhold his commission, therefore, is an act "deemed by the Court not warranted by law, but violative "of a *vested legal right.*

"This brings us to the second inquiry, which is: "2d. If he has a right, and that right has been vio- "lated, do the laws of his country afford him a remedy?

"The very essence of civil liberty is the right of every "individual to claim the protection of the laws, whenever "he receives an injury. One of the first duties of govern- "ment is to afford that protection. In Great Britain the "King himself is sued in the respectful form of a petition, "and he never fails to comply with the judgment of his "court . . . . .

"The government of the United States has been "emphatically determined a government of laws and not "of men. It will certainly cease to deserve this high "appellation if the laws furnish no remedy for a "vested legal right.

"If this obloquy is to be cast on the jurisprudence of "our country it must arise from the peculiar character of "the case.

"It behooves us then to enquire whether there be in its "composition any ingredient which shall exempt it from

"legal investigation or exclude the injured party from "legal redress. In pursuing this inquiry the first question "which presents itself is, whether this can be arranged "with that class of cases which come under the description "of *damnum absque injuria;* a loss without an injury.

"This description of cases never has been considered, "and it is believed never can be considered as compre- "hending *offices of trust, of honor, or of profit.* The office "of justice of peace of District of Columbia is such an "office; it is therefore worthy of the attention and guard- "ianship of the laws . . . . . It is not therefore on "account of the worthlessness of the thing pursued that "the injured party can be alleged to be without a remedy.

"Is it in the nature of the transaction? Is the act "of delivery or withholding a commission to be consid- "ered as a mere political act, belonging to the executive "department alone, for the performance of which entire "confidence is placed by our Constitution in the supreme "executive, and for any misconduct respecting which the "injured individual has no remedy?

"That there may be such cases is not to be questioned; "but that every act of duty to be performed in any of the "great departments of government, constitutes such a case "is not to be admitted." (Pages 162 to 164.)

The Court here discusses this question and concludes as follows:

"But when the legislature proceeds to impose on that "officer other duties; when he is directed peremptorily to "perform certain acts; when the rights of individuals are "dependent on the performance of those acts, he is so far "the officer of the law; is amenable to the laws for his "conduct; and can not at his discretion *sport away the* "*vested rights of others.*

"The conclusion from this reasoning is that where the "heads of departments are the political or confidential "agents of the executive, merely to execute the will of the "President, or rather to act in cases in which the execu- "tive possesses a constitutional or legal discretion, nothing "can be more perfectly clear than that their acts are only "politically examinable. But where a specific duty is "assigned by law, and *individual rights depend upon the "performance of that duty*, it seems equally clear that the "individual who considers himself injured has a right to "resort to the laws of his country for a remedy."

The latter part of the language here quoted bears upon the subject of the third branch of our argument, viz.: the power of this Court to afford a remedy in the case at bar; but we quote the opinion now on the subject of the *nature of a public office*, where an appointment has been made for a *fixed term, with no power of discretionary revocation or discharge*. And the opinion does establish the proposition that the right to such an office is a "legal right," a "vested legal right," a vested legal right *of value*, which is protected by the law of the land, and which no officer or tribunal, whether high or low, can arbitrarily "*sport away*." And, as we shall hereafter show, since the adoption of the Fourteenth Amendment to the Federal Constitution, whereby any State acting by any of its officers, whether executive, legislative or judicial, is forbidden to deprive any person of life, liberty or property, this Court, when a suit is brought to convert such "sport" into a dread reality, can say, "It shall not be done."

In Kennard vs. Louisiana, 92 U. S., 480, involving the office of Justice of the Supreme Court of Louisiana, Chief Justice Waite thus states the question in the case, viz.:

"The *sole question presented* for our consideration in "this case, as stated by the counsel for the plaintiff in

"error, is, whether the State of Louisiana, acting under the "statute of January 15, 1873, through her judiciary *has de-* "*prived Kennard of his office without due process of law.*"

No doubt was suggested by the Court of the proposition that the right to the office was within the constitutional protection; and the sole question discussed was as to whether there had been due process of law in the proceeding by which the plaintiff in error had been deprived of his office. On this latter question certain language was used, the effect of which has been modified by later decisions.

In Foster vs. Kansas, 112 U. S., the sole question was the right of Foster to the office of County Attorney of Saline county, Kansas. He claimed he had been removed without due process of law. The Court expressed no doubt of the proposition that the right to the office was protected by the Constitution; though it affirmed the judgment on the authority of Kennard vs. Louisiana, *supra.*

In Cummings vs. Missouri, 4 Wall, 277, this Court said:

"The theory upon which our political institutions rest "is, that all men have certain inalienable rights—that "among these are life, liberty and pursuit of happiness; "and that in the pursuit of happiness all avocations, all "honors, all positions are alike open to every one and that "in the protection of those rights all are equal before the "law. Any deprivation or suspension of any of these "rights for past conduct is punishment, and can be in no "otherwise defined." (Page 321.)

Surely if deprivation of an honorable and lucrative position is punishment when done for past misconduct, it is such a loss as cannot be inflicted without due process of law when there is no charge of past misconduct.

Again in Dent vs. West Virginia, 129 U. S., 114, this Court said:

"It is undoubtedly the right of every citizen of the "United States to follow any lawful calling, business or "profession he may choose, subject only to such restric- "tions as are imposed upon all persons of like age, sex and "condition. This right may in many respects be consid- "ered as a distinguishing feature of our republican insti- "tutions. All may be pursued as sources of livelihood, "some requiring years of study and great learning for "their successful prosecution. The interest, or, as it is "sometimes termed, the estate acquired in them, that is, "the right to continue their prosecution, is often of great "value to the possessors and *cannot be arbitrarily taken* "*from them, any more than their real or personal property* "*can be thus taken from them.*"

It is true the Court was not speaking here strictly of an office, but it was speaking of a very kindred subject, viz., the right in general to follow chosen vocations, and while this is not strictly "property" according to the usual signification of that term, the Court recognizes it as a *right of value*, which can no more be arbitrarily taken away than can technical property.

Wilson vs. North Carolina, 169 U. S., 586, will doubtless be cited as authority against us in the case at bar, but it has no application to any question now before the Court. Under a statute of North Carolina providing for a Railroad Commission, it was provided that in the event of a Commissioner becoming disqualified to act the Governor might *suspend* him from office and report that fact, with his reasons, to the next General Assembly, and that the General Assembly should then determine the question of his removal; and that in the event that body determined not to remove him, he should be entitled to his salary during the suspension.

The Governor exercised this power in the case of Wilson, and *suspended* him. He refused to vacate the office, and

proceedings were instituted to oust him. He claimed he had been deprived of his property without due process of law, because the Governor would not disclose the evidence against him. The Court did not question the proposition that the right to an office is protected by the constitutional provision referred to; but it simply showed that here was a statute (which was in force when the office was accepted) which provided for removal for cause by the General Assembly, but, for reasons of manifest public policy, gave the Governor the absolute power to *suspend* the officer believed to have become disqualified, *until that question could be determined*. The statute was manifestly a valid, wise, and reasonable one; Wilson had accepted the office with knowledge of its provisions; the Governor's action was clearly within its terms; and it was so absolutely plain that there was here no deprivation of any right without due process of law, that this Court said there was not even "fair color" for the claim of spoliation.

But in the case at bar there was no mere suspension from office, but an attempt at absolute and final deprivation. And no one here claims that the General Assembly was given the right by the Constitution arbitrarily to remove one man from the office of Governor, and put another one in. It is conceded that the only power vested in that body was to *try a contest over the right to the office;* and the only question of difference between us is as to whether or not the action of the General Assembly in this regard is absolutely *immune from judicial inquiry*, so that it can say: "Anything we do is due process of law." Defendants in error assert the affirmative on this question, and plaintiffs in error the negative.

Again the case of *ex parte* Sawyer is referred to on the question of the nature of the right to office. But that case simply holds that a *court of equity* of the United States can not interfere in the matter of the appointment or removal of public officers, as this is purely a matter of legal cognizance.

There is no suggestion that the right to an office is not protected against arbitrary deprivation by the Federal Constitution. On the contrary there is a very clear intimation, if not an express statement, to the contrary. The Court says:

> "If the ordinances and proceedings of the City Council "are in the nature of civil as distinguished from criminal "proceedings, the only possible ground, therefore, for the "interposition of the courts of the United States in any "form is that Parsons, if removed from the office of police "judge, will be deprived by the State of life, liberty or "property without due process of law in violation of the "Fourteenth Amendment to the Constitution, or that the "State has denied him the equal protection of the laws, "secured by that amendment." (Page 219.)

Then, after showing that courts of equity can not interfere with the matter of appointing or removing officers, the Court says:

> "The reasons which preclude a court of equity from "interfering with the appointment or removal of public "officers of the government, from which the court derives "its authority, apply with increased force when the court "is a court of the United States and the officers in question are officers of a State. If a person claiming to be "such an officer is, by the judgment of a court of the State, "either in appellate proceedings or upon a *mandamus* or "*quo warranto*, denied any right secured to him by the "Constitution of the United States, *he can obtain relief by "a writ of error from this Court.*" (Page 220.)

We, therefore, respectfully submit, in conclusion upon this point, both on principle and authority, that the right to an office of the character now under consideration, is a right which is secured by the Constitution of the United States

and can not be taken away by the State, acting through any of its departments, except by "due process of law."

II.

The Right of Suffrage.

But there is another aspect of this case, another standpoint of view. Great as is the personal interest of Taylor, the interest of the people, the electors, the voters of Kentucky, in the outcome, is vastly greater. For Taylor personally there is involved the right to an office of honor and emolument for four years. For the people there is involved the principle, not for a day, nor a year, but forever, of their right to choose their representatives and to have those thus chosen, and no others, represent them in executive, legislative or judicial capacities.

A public office is a public trust, and the people are the *cestuis que trustent.* In this contest they are therefore real parties in interest, not *in propriis personis*, but as represented by the nominal parties. They have a deep interest in who shall represent them as their chief magistrate; a deep interest, not theoretical only, but practical, in the question of whether the man chosen by the greatest number of the voters or some other man shall represent them as Governor; a deep interest in the question of whether all the qualified voters of the State, admittedly qualified according to the terms of the State Constitution, or only a favored portion thereof, shall be allowed to choose a Governor for the whole State.

These questions of deep practical interest to the people of Kentucky will be adjudged and determined in this case. If Taylor is put out and Beckham put in, by this judgment, there will be no way for the people thereafter to

relitigate the question as to who is their Governor. Therefore they have a right to be heard here and now in defense of the rights they claim, and to have the case considered from the standpoint of their rights to be here settled before the final judgment is entered. "Wherever one is assailed in his person or his property," or, we may add, in any right which is the subject of judicial protection, "there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a Court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal." (Windsor vs. McVeigh, 93 U. S., 274, 277.) Therefore as the people of Kentucky have a vastly important interest in this litigation, which will be settled by the judgment herein, they have a right to be heard as to that interest, and to have it considered by the Court and protected by the judgment it shall enter. This interest is specially pleaded and the protection of the Constitution of the United States specially invoked for it by the defendants, Taylor and Marshall, in their answer in this cause, recognizing, as they do and as they expressly allege, that they are representatives or trustees, though having also, as is often the case, a personal interest in maintaining their own positions. (Rec. 1, pp. 15, 35, 43 and 61.)

Neither the government of the United States nor that of Kentucky is a democratic government, that is, one where all the people meet and take action, but each is a republican, viz., a representative government, where all the people act, but through representatives chosen by them. It is therefore of the very essence of such a government that these representatives be chosen *by the people.* Otherwise it is not a government by the people at all, neither a democratic nor a republican government, but an oligarchy.

Now it is claimed in the case at bar that the pretended "adjudication and determination" of the General Assembly of Kentucky, to the effect that Goeble received the highest number of votes and was elected Governor, and which the Court is now asked to enforce, was not in truth an adjudication at all, but, to use the language of this Court in speaking of a certain pretended decree was "a mere arbitrary edict, clothed in the form of a judicial sentence." (Windsor vs. McVeigh, *supra*); and that if it is enforced, one chosen by the people for their representative as Governor will be displaced, and one not thus chosen will be installed to represent them in violation of rights secured to them by the Constitution of the United States.

It is said the Constitution of the United States affords no protection to the rights here involved, viz., the right of the people to choose their representatives in State affairs. But we assert, and we believe we can maintain, that it does, and that it is the sacred duty of this Court, when a suit comes before it, in which the right to that protection is specially set up and claimed, to see that the claim is allowed.

There are two provisions of the Constitution which bear upon this question, and which supplement each other. They are Section 4 of Article 4 of the original Constitution, and the 14th Amendment; being the two provisions specially and expressly relied upon in the answer herein. (Rec. 1, p. 15.) They are respectively as follows, viz.:

"The United States shall guarantee to every State in "the Union a republican form of government, and shall "protect each of them against invasion, and on applica- "tion of the Legislature, or of the Executive (when the "Legislature cannot be convened) against domestic vio- "lence." (Art. 4, Sec. 4.)

"No State shall make or enforce any law which shall "abridge the privileges or immunities of the citizens of the

"United States, nor shall any State deprive any person of "life, liberty or property, without due process of law; nor "deny to any person within its jurisdiction the equal pro- "tection of the laws." (14th Amendment.)

Let us first consider Article 4, Section 4, above quoted.

There are two distinct ideas in this section, which are the complements of each other, and either of which without the other would be probably destructive either of liberty or of law. One is a distinct promise to the people of a State, viz., the guaranty of a republican form of government, and the other is a distinct promise to the government of the State, viz., to aid it in repelling violent uprisings of the people. And, as just said, these two promises must be maintained together, for the maintenance of one and the neglect of the other would be destructive, in the one case, of liberty, and in the other, of law. Hence their close association in the Constitution. Hence Alexander Hamilton, in the Federalist, number 21, in speaking of the lack of any guaranty by the old Confederacy to the States, in the Articles of Confederation, and of the necessity of such a guaranty, says:

"A guaranty by the National authority would be as "much directed against the usurpation of rulers, as against "the ferments and outrages of faction and sedition in the "community."

If Kentucky were not a member of the American Union, if she were an absolutely independent State, her people would have the right, if oppressed or tyrannized by those in high places, to rise in their might and by force and arms eject them. But when the State entered the Union this right was given up, or, at least, its effective exercise was rendered impossible; for should the people of the State attempt by force to correct or punish that which they might consider abuses of power by the constituted authorities of the State,

the whole power of the Union would be called into play against them, under the promise of protection to the State "against domestic violence."

This right of revolution, peaceable if possible, but forcible if necessary, has always been considered of inestimable value to every liberty-loving people; and it is absolutely essential to the preservation of liberty, unless, in case of the surrender of the right, *some equally or more effective guaranty of the maintenance of that liberty is received in return.*

Did the people of the States receive any such guaranty when they surrendered their right of forcible revolution in State affairs? They did; and this was contained in the first clause of the section above quoted, viz.:

> "The United States shall guarantee to every State in "this Union a republican form of government."

That this is a promise to the *people* of a State, as distinguished from the *government* of the State, is stated by this Court in Texas vs. White, 7 Wall., 700-721; and it is the return, the equivalent, for their surrender of the right of forcible revolution as a protection of their liberty.

What is meant by a republican form of government, which is here guaranteed? There are many varieties of republican government. But there is one thing which is absolutely essential to it, a *sine qua non*, and that is the *right of the people to choose their representatives*, by which we mean their public officers in the several departments of of State. It is the exercise of that right which makes it a representative government *by the people.* Nullify that feature, in theory or practice, and, whatever else may remain, *republicanism is dead.*

This exact idea is briefly but forcibly stated by this Court in its opinion by Mr. Chief Justice Fuller in Duncan vs. McCall, 139 U. S., 449-461, as follows, viz.:

> "By the Constitution a republican form of govern-"ment is guaranteed to every State in the Union, and *the*

"*distinguishing feature of that form is the right of the* "*people to choose their own officers for governmental ad-* "*ministration*, and pass their own laws in virtue of the "legislative power reposed in representative bodies, whose "legitimate acts may be said to be those of the people "themselves."

We may, therefore, accept as certainly true that *the right of the people to choose their officers* who should represent them in State affairs, was the *essential right which was guaranteed by this clause of the Federal Constitution*, in exchange, and as an equivalent, for their surrender of the right of revolution.

It, therefore, manifestly can not be, and is not true, that the Constitution of the United States affords no protection to the right of the people of the several States to vote in State elections and thereby choose their representatives. It expressly guarantees this right.

But it may be suggested that the United States only guarantees to the people of the State a republican *form* of government; not that they shall actually have republicanism; not that they shall really and actually be allowed to choose their own representatives; not that they shall actually have liberty and freedom from "the usurpations of rulers"; but merely that they shall have *parchment liberty*, *freedom on paper;* and that if rulers do usurp powers not given them by this parchment or paper, and do oppress the people, the United States will put down the people in case they rise with force against this tyranny, but can give them no relief for their wrongs, because they have a republican *form* of government.

Was this guaranty of form all that the people received in exchange for their surrender of the right of forcible resistance to despotism? What they gave up was substantial—it was the right of "the strong man" to protect his own. "Or

else how can one enter into a strong man's house and spoil his goods, except he first bind the strong man? And then he will spoil his house." The "strong man" in Kentucky has permitted himself to be bound by the bonds of the Federal Constitution, but he did it under the solemn promise, the guaranty, that no one would be permitted to "spoil his house."

Did our forefathers, fresh from a struggle with tyranny, and learned in the lessons of history, as their writings show, indulge the vain delusion that the mere "form of law" would preserve liberty and benumb the hand of despotism? Had they forgotten that the tyrant may use the form of law as an engine of oppression; that Satan may wear Heaven's livery. We know that James Madison was not thus oblivious to the truth, for, writing in the Federalist in the effort to secure the adoption of the Federal Constitution, he says:

> "Will it be sufficient to mark with precision the "boundaries of these departments in the Constitution of "the government, and to trust to these *parchment barriers* "against the encroaching spirit of power? This is the "security which appears to have been principally relied on "by the compilers of most of the American Constitutions. "*But experience assures us that the efficacy of the provision* "*has been greatly overrated.*"

And so Mr. Justice Story, in an address on the science of government, says it is one of the commonest errors as to government "that, when once erected on correct principles, it will stand without assistance. 'By its own weight made steadfast and immovable.' This is the besetting delusion (I had almost said the besetting sin) in all popular governments." (Story's Miscellaneous Writings, p. 619.)

But it is needless to say more on this subject; the men who framed the Federal Constitution were men of eminently

practical wisdom; they knew that "parchment barriers" against oppression were not sufficient; and when they, and the people who ratified and adopted the Constitution, surrendered the right of self-protection against tyranny in the States, they did so with the understanding that an *effective* protection by the Union was secured to them in return; and that the United States guaranteed to the people of every State the right to choose their representatives, a guaranty which would be practically effective if the right should be violated.

We repeat therefore that this is a right which is protected by the Federal Constitution, by a guaranty which is companion to the promise of assistance to the *government* of the State in resisting domestic violence.

The use of the word "guarantee" in this connection is well worthy of consideration in determining the exact relation of the parties in interest. It is a word of well defined meaning, one well understood by the great lawyers who sat in the convention which framed the Federal Constitution, and it expresses with peculiar fitness the exact obligation intended. "A guaranty is a promise to answer for the payment of some debt, or *the performance of some duty, in the case of the failure of another person who is himself in the first instance liable to such payment or performance.*" (14 Am. and Eng. Ency. of Law, p. 1128—2d Edition.) So the United States does not in the first instance give to the people of the States the right to choose their representatives; but it *guarantees* it. The primary obligation is on the State to see that the people are allowed the opportunity to choose their representatives; but should the State default on this obligation, should it fail in the performance of this duty, the United States *guarantees* it.

As to the right and power of this Court to render effectual this guaranty in the case at bar, we will speak in a later part of our argument. We confine ourselves for the present to the existence of the right and of the obligation to protect it.

Thus far we have spoken only of the fourth section of the Fourth Article of the Constitution. But the Fourteenth Amendment gives additional and broader power to the Federal government, and enables it to check arbitrary oppression by a State whenever and wherever and by whatever agency or department it may attempt it. It provides that "No State shall . . . deprive any person of life, liberty or property without due process of law."

We submit that the right of the people to vote, their right to choose their own representatives as a part of their political "liberty," is protected by this provision. We do not mean that it guarantees universal suffrage; we will explain later exactly what we mean in this regard. We submit that this amendment is a constitutional protection to the individual, and *every right he has*, against *arbitrary spoliation by a State.*

In Bank vs. Okely, 4 Wheat., 244, this Court, in speaking of the requirements of due process of law, said:

"They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (Strongly approved in Hurtado vs. California, 110 U. S., 527.)

In speaking of a limited use made of the words "life, liberty and property" as used by counsel, this Court, in Cummings vs. Missouri, 4 Wall., 277, said:

"The learned counsel does not use these terms—life, "liberty and property—as comprehending every right "known to the law. He does not include under property "those estates which one may require in professions, "though they are often the source of the highest emolu- "ments and honors. The deprivation of any rights, civil

"or political, previously enjoyed, may be punishment; "the circumstances attending and the causes of the "deprivation determining this fact." (Page 320.)

In the Slaughter-House Cases, 16 Wall., 36, in speaking of the meaning of these terms, as used in the Fourteenth Amendment, Mr. Justice Swayne, said:

"Life, liberty and property are forbidden to be taken "without due process of law. Life is the gift of God, and "the right to preserve it is the most sacred of the rights of "man. Liberty is freedom from all restraints except such "as are justly imposed by law. Beyond that line lies the "domain of usurpation and tyranny." (Page 127.)

In People vs. Marx, 99 N. Y., 386, the Court of Appeals of New York said:

"The term 'liberty,' as protected by the Constitution, "is not cramped into a mere freedom from physical "restraint of the person of the citizen, as by incarceration, "but is deemed to embrace the right of man to be free in "the enjoyment of the faculties with which he has been "endowed by the Creator, subject only to such restraints "as are necessary for the common welfare." (Page 386.)

In Brown vs. Hummel, 6 Pa. St., 86, the Supreme Court of Pennsylvania said:

"But the most important of all our franchises—the "right of an elector and citizen—can not in a confined "sense be called property. It is not assets to pay debts; "nor does it descend to the heir or administrator. But "who does not feel its value; and who but would turn "pale, if he thought he could be deprived of it, without "hearing or trial, by an act of assembly." (Page 93.)

In People vs. Hurlbut, 24 Mich., 44 (9 Am. Rep., 103), the Supreme Court of Michigan, through Judge Cooley, thus speaks of what is meant by constitutional freedom:

"*What is constitutional freedom?* Has the administration of equal laws *by magistrates freely chosen* no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where, in the Constitution, the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. *Some things are too plain to be written* . . . . .

Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; *it consists in the civil and political rights which are absolutely guaranteed, assured and guarded;* in one's liberties as a man and a citizen—*his right to vote, his right to hold office*, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow citizens; all these guarded and protected and *not held at the mercy and discretion of any one man or of any popular majority.* (Story, Miscellaneous Writings, 620.) If these are not now the absolute right of the people of Michigan, they may be allowed more

"When we consider the nature and the theory of our "institutions of government, the principles upon which "they are supposed to rest, and review the history of their "development, we are constrained to conclude that they do "not mean to leave room for the play and action of purely "personal and arbitrary power. Sovereignty itself is, of "course, not subject to law, for it is the author and source "of law; but in our system, while sovereign powers are "delegated to the agencies of government sovereignty "itself remains with the people, by whom and for whom "all government exists and acts. And the law is the defi- "nition and limitation of power. It is, indeed, quite true "that there must always be lodged somewhere, and in some "person or body, the authority of final decision; and in "many cases of mere administration the responsibility is "purely political, no appeal laying except to the ultimate "tribunal of the public judgment, exercised either in the "pressure of opinion or by means of the suffrage. But "the fundamental rights to life, liberty and the pursuit of "happiness, considered as individual possessions, are "secured by those maxims of constitutional law which are "the monuments showing the victorious progress of the race "in securing to men the blessings of civilization under the "reign of just and equal laws, so that, in the famous lan- "guage of the Massachusetts Bill of Rights, the govern- "ment of the Commonwealth 'may be a government of "laws and not of men.' For, the very idea that one man "may be compelled to hold his life, or the means of living, "or any material right essential to the enjoyment of life, "at the mere will of another, seems to be intolerable in "any country where freedom prevails, as being the essence "of slavery itself.

"There are many illustrations that might be given of "this truth, which would make manifest that it was self- "evident in the light of our system of jurisprudence. *The "case of the political franchise of voting is one.* Though not "regarded strictly as a natural right, but as a privilege "merely conceded by society according to its will, under "certain conditions, nevertheless, *it is regarded as a funda- "mental political right, because preservative of all rights.*"
(Yick Wo vs. Hopkins, 118 U. S., 369.)

"liberty of action and more privileges, but they are little "nearer to constitutional freedom than Europe was when "an imperial city sent out consuls to govern it" . . . (Page 106, etc.)

We have cited this last case, being an opinion by Judge Cooley, and including in it a reference to the views of Mr. Justice Story, to show that our constitutional freedom, our constitutional "liberty," that is our "liberty" as secured by the Constitution, includes the right to vote, and we have cited other cases to show the broad meaning given to the words "life, liberty and property" by this Court; and we think we have shown that the Fourteenth Amendment, using these terms, as it does, is a prohibition against the exercise of *arbitrary power by a State* in despoiling a person of *any right he has.*

Now, coming to the immediate question of the protection by this Fourteenth Amendment of the right to vote in State elections, we find this Court has expressly said that the right to vote, if given by the State law, is protected by this amendment to the Federal Constitution, against arbitrary deprivation by the State.

In Minor vs. Happersett, 21 Wall., 162, this Court showed with great clearness that the Fourteenth Amendment did not confer any right to vote, and did not create universal suffrage, but said the Court:

> "*The right of suffrage, when granted, will be protected.* "*He who has it can only be deprived of it by due process of* "*law, but in order to claim protection, he must first show* "*that he has the right.*" (page 176.)

We believe we have established in the foregoing pages that the Constitution of the United States, both by the provision guaranteeing to the people of the States a republican form of government, the essential feature of which is the

right of the people to choose their representatives in the various departments of government, and by the Fourteenth Amendment prohibiting any State from depriving any person of life, liberty or property without due process of law, has protected and guaranteed the right of the people of every State to vote, against the arbitrary action of any department of the government of the State in attempting to deprive them of this right. Of course we do not contend that the Federal Constitution requires universal suffrage in the States. That never has existed in any State. The people may meet in a sovereignty convention, and by the adoption of a constitution, limit the right of suffrage, and provide how it shall be exercised, whether by a direct vote by the people in every instance, or by first electing representatives and then having these representatives elect or appoint some other representative, as is done in the case of the election of a President by the electoral college, or an election of a United States Senator by the General Assembly, or in the case of the appointment of judges by the Executive. But what we do maintain is that, when the people, by their Constitution, have fixed the right of suffrage, and have provided for a direct vote by those upon whom the right of suffrage is conferred, then they *must be allowed to vote*, and thus to choose their representatives; and that any arbitrary deprivation of this right by the State, through any department or agency of the State, whether executive, legislative or judicial, is forbidden by the Federal Constitution.

III.

The Power of This Court to Give Relief.

At every point at which we assailed the alleged "judgment" of the General Assembly we were met in the State Court with the proposition, practically and substantially, that

this was an action taken by the General Assembly, and that the Court had no power to inquire into it; that the Court would conclusively presume that all was done which ought to have been done, and nothing done which ought not to have been done; or, in other words, that the General Assembly can do no wrong, because there is no power in the State that can inquire into it and say that it is wrong.

To give some idea of the views maintained by the Court of Appeals of Kentucky, we give a brief extract from the opinion of Judge Burnam, who concurred in the judgment. After stating that it was alleged in the answer, and admitted by the demurrer, that the alleged "judgment" was made pursuant to an agreement to that effect entered into between Goebel and the members of the General Assembly prior to the institution of the contest; and that the General Assembly did not have a particle of testimony before it, and was wholly ignorant of the facts, when it pretended to make the determination wiping out the majority shown by the returns; and that it made this pretended adjudication at a secret meeting, not only without notice to either Taylor or Marshall, but without notice to at least one-third of the members of the General Assembly itself, and without opportunity to any of them to be present, the Judge then proceeds:

"It is hard to imagine a more flagrant and partisan "disregard of the modes of procedure which should "govern a judicial tribunal in the determination of a great "and important issue than is made manifest by the facts "alleged and relied on by the contestees, and admitted by "the demurrer filed in this action to be true, and I am "firmly convinced, both from these admitted facts and "from knowledge of the current history of these transac-"tions, that the General Assembly, in the heat of anger, "engendered by the intense partisan excitement which was "at that time prevailing, have done two faithful, conscien-

"tious and able public servants an irreparable injury in "depriving them of the offices to which they were elected "by the people of this Commonwealth, and a still greater "wrong has been done a large majority of the electors of "this Commonwealth, who voted under difficult circum- "stances to elect these gentlemen to act as their servants "in the discharge of the duties of these great offices." (Rec. 1, p. 156.)

Yet the Court held, Judge Burnam concurring, that on account of the division of the powers of government, the judiciary was absolutely powerless to give any relief.

Is this Court equally impotent if it shall appear that this alleged "adjudication," whether legislative or judicial, was made in violation of rights guaranteed and protected by the Constitution of the United States? We maintain, on the authority of the precedents of an hundred years, and on essential principles that must be true, that no such impotency exists; and that there is no such division of powers between *this Court* and the General Assembly of Kentucky as to prohibit this Court, when it is claimed that the proceedings of the General Assembly were violative of rights secured by the Federal Constitution, from examining into them, and *refusing to enforce them*, if found to be so.

We again ask the Court to remember how the questions arise in the case before the Court.

The plaintiff Beckham, as the successor of Goebel, sues Taylor for the office. He does not allege in his petition that Goebel was elected Governor, but he alleges that the General Assembly "adjudged and determined" that he was thus elected. The defendant Taylor alleges his election, his receipt of the certificate of election in evidence thereof, his induction into the office and continued possession thereof; and he attacks this alleged legislative adjudication as void, on the ground that it was the mere "arbitrary exercise of the

powers of government, unrestrained by the established principles of private right and distributive justice" (Bank vs. Okely, 4 Wheat., 235-244); that it was not "due process of law," thas it was a mere attempt of a few men, arbitrarily to *appoint a Governor* of their choice for the State of Kentucky, and that, if the proceeding be upheld and enforced by the Court, it will thereby deprive the people of Kentucky of their right to choose their own Governor, a right guaranteed to them by the Federal Constitution; and that therefore the Court should uphold the integrity of the Constitution and *refuse to enforce* this arbitrary edict which plaintiff asks it to enforce.

In Hurtado vs. California, 110 U. S., 516, 536, is the following striking language:

> "The limitations imposed by our constitutional law "upon the action of the government, both State and "National, are essential to the preservation of public and "private rights, notwithstanding the representative charac- "ter of our political institutions. *The enforcement of* "*these limitations by judicial process is the device of self-* "*governing communities* to protect the rights of individuals "and minorities, as well against the power of numbers, as "against *the violence of public agents transcending the* "*limits of lawful authority, even when acting in the name* "*and wielding the force of the government.*"

Mr. Justice Story, in his address on the science of government, heretofore alluded to, after showing that "the great objects of all free governments . . . . are the protection and preservation of the personal rights, the private property, and the public liberties of the whole people," and that among the "public liberties" of the man and citizen are "his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience," and that

these are of no value if left to "the mercy of the neighboring demagogue or the popular idol of the day," then says:

> "How, then, are these rights to be established and pre-
> "served? The answer is, by constitutions of government
> "wisely framed and vigilantly enforced; by laws and
> "institutions deliberately examined and steadily admin-
> "istered; *by tribunals of justice* above fear and beyond
> "reproach, whose duty it shall be to protect the weak
> "against the strong, to guard the unwary against the
> "cunning, and to *punish the insolence of office, and the*
> "*spirit of encroachment and wanton injury.*" (Story's Miscellaneous Writings, 619, 621.)

In the eightieth number of the Federalist Alexander Hamilton, after saying that it does not admit of controversy that the judicial power of the Union ought to apply, "1st, to all those (cases) which arise out of the laws of the United States," then says:

> "The first point depends upon this obvious considera-
> "tion, that *there ought always to be a constitutional method*
> "*of giving efficacy to constitutional provisions.* What, for
> "instance, would avail restrictions on the authority of
> "State legislatures without some constitutional mode of
> "enforcing the observance of them? . . . No man of sense
> "will believe that such prohibition would be scrupulously
> "regarded without some effectual power in the government
> "to restrain or correct the infractions of them. This
> "power must either be a direct negative on the State laws
> "or an authority in the Federal courts to overrule such as
> "might be in manifest contravention of the articles of
> "Union. There is no third course that I can imagine.
> "The latter appears to have been thought by the conven-
> "tion preferable to the former, and I presume will be most
> "agreeable to the States." (The power to declare a State

STATUTE unconstitutional is here given merely as an *illustration* of the general power of enforcing the Constitution.)

And again in the sixteenth number of the Federalist the same writer, in speaking of the National government, says:

"It must carry its agency to the persons of the citi-
"zens. It must stand in need of no intermediate legisla-
"tions, but must itself be empowered to employ the arm
"of the ordinary magistrate to execute its own resolutions.
"*The majesty of the National authority must be manifested*
"*through the medium of the courts of justice.*"

In like manner this Court has frequently exhibited its power to investigate the acts of both the legislative and executive departments of the National government, and, as we shall presently see, also of the State governments, and to declare them of no effect where they arbitrarily destroyed private rights.

In the case of Kilbourn vs. Thompson, 103 U. S., 168, Kilbourn had been arrested and imprisoned under an order of the lower House of Congress for an alleged contempt in refusing to answer certain questions put to him by a committee of investigation. He sued the Sergeant-at-Arms for false arrest, and thus arose the question of the validity of the order of commitment, and the question as to whether or not he had been deprived of his liberty by due process of law. Speaking of this phrase, due process of law, the Court said:

"It has been repeatedly decided by this Court, and by
"others of the highest authority, that this means a trial
"in which the rights of the parties shall be decided by a
"tribunal appointed by law, *which tribunal is to be gov-*
"*erned by rules of law previously established.*" (Page 182.)

And again, the Court stated its emphatic concurrence in the following language of the Supreme Court of Massachusetts, to-wit:

"The House of Representatives is not the final judge "of its own power and privileges *in cases in which the* "*rights and liberties of the subject are concerned*, but the "legality of its action may be examined and determined "by this Court. That House is not the Legislature, but "only a part of it, and is, therefore, subject in its action to "the laws, in common with all other bodies, officers and "tribunals within the Commonwealth. *Especially is it* "*competent and proper for this Court to consider whether* "*its proceedings are in conformity with the Constitution and* "*laws*, because living under a written Constitution, no "branch or department of the government is supreme; and "*it is the province and duty of the judicial department to* "*determine, in cases regularly brought before them, whether* "*the powers of any branch of government*, and even those "of the Legislature in the enactment of laws, *have been* "*exercised in conformity to the Constitution, and if they* "*have not, to treat their acts as null and void.*" (Page 199.)

In the case of United States vs. Lee, 106 U. S., 196, General Custis Lee had sued to recover his ancestral home of "Arlington," just after the close of the late civil war. It was in the possession of two men who were officers of the United States government, and who claimed to hold it as such for the purposes of a public cemetery, etc. When the suit was brought for the recovery of the property the case was removed to the Federal Court, and the suggestion was made by the Attorney-General of the United States that this property was held by the United States, through its officers and agents, it having been taken possession of BY ORDER OF THE PRESIDENT. And it was insisted that this should be an

end of the inquiry. The language of the Court, by Mr. Justice Miller, is instructive as defining the rights of citizens, and the limitations upon the powers of government. It says:

"No man in this country is so high that he is above "the law. No officer of the law may set that law at defi- "ance with impunity. All the officers of the government, "from the highest to the lowest, are creatures of the law, "and are bound to obey it.

"It is the only supreme power in our system of gov- "ernment, and every man who, by accepting office, partici- "pates in its functions is only the more strongly bound to "submit to that supremacy, and to observe the limitations "which it imposes upon the exercise of the authority "which it gives.

"Courts of justice are established, not only to decide "upon the controverted rights of the citizens as against "each other, but also upon rights in controversy between "them and the government; and the docket of this Court "is crowded with controversies of the latter class.

"Shall it be said in the face of all this, and of the "acknowledged right of the judiciary to decide, in proper "cases, statutes which have been passed by both branches "of Congress and approved by the President to be uncon- "stitutional, that the courts can not give a remedy when "the citizen has been deprived of his property by force, "his estate seized and converted to the use of the govern- "ment without lawful authority, without process of law, "and without compensation, because the President has "ordered it, and his officers are in possession?

"If such be the law of this country, it sanctions a "tyranny which has no existence in the monarchies of "Europe, nor in any other government which has a just "claim to well-regulated liberty and the protection of per- "sonal rights." (Page 220.)

And this language was quoted *in extenso* and reap proved in Tindal vs. Wesley, 167 U. S., 217.

In Pennoyer vs. Neff, 95 U. S., 714, this Court points out the change made in the administration of justice by the Fourteenth Amendment to the Federal Constitution. It was dealing with an alleged judgment of a court of Oregon which was relied on by plaintiff, and attacked by defendant as having been entered without due process of law. The Court calls attention to the fact that in some cases, in speaking of personal judgments rendered without personal service of process or appearance, the courts had said that such a personal judgment has no binding force *without the State where rendered*, thus implying that it did have such effect *within the State.* The Court then says that "the language used can be justified only on the ground that there was *no mode of directly reviewing such judgment or impeaching its validity within the State where rendered.*" But, says the Court:

> "Since the adoption of the Fourteenth Amendment to "the Federal Constitution the validity of such judgments "may be directly questioned, and their enforcement in the "State resisted, on the ground that proceedings in a court "of justice to determine the personal rights and obliga- "tions of parties over whom that court has no jurisdiction, "*do not constitute due process of law.*" (Page 733.)

And of course the same thing would be true where for *any reason* it was claimed that the proceedings were not due process of law.

We call special attention to this case on account of its clear expression of the thought that since the adoption of the Fourteenth Amendment a judgment of a State tribunal against which there might previously have been no relief, because there was no means of attacking it, may now be

resisted or attacked by virtue of the power which this Court has to enforce the provisions of that Amendment. And the same thing of course would be true of any other provisions of the Federal Constitution that might have been violated by the judgment sought to be enforced.

This principle has a direct application to the case at bar. If the courts of Kentucky, when asked to enforce this alleged legislative judgment, say that they are bound to enforce it, and that, on account of the division of the powers of the State government, they can not inquire into it at all, but must conclusively presume it was all it should have been, *this Court* is not restrained by any such considerations when a party comes before it claiming that the alleged judgment violates the Constitution of the United States.

The cry of immunity of this alleged judgment from judicial investigation because it was the action of the General Assembly looses all its force when the case gets here, and should have had no force in the State Court, because this Court has held again and again that the prohibition of the Fourteenth Amendment against any State depriving any person of life, liberty or property applies equally to *all the departments of State government*—just as much to the legislative as to the judicial, and just as much to the judicial as to the executive—to every department or agency through which a State acts.

This principle has so often been reiterated by this Court that we hesitate to cite authorities upon it; and yet on account of the great importance of it in the case at bar we cite a few of the cases referred to.

In Chicago, Burlington, etc., R. R. Co. vs. Chicago, 166 U. S., 226, this Court said:

> "But it must be observed that the prohibitions of the "(Fourteenth) Amendment refer to all the instrumentali- "ties of the State, to its legislative, executive and judicial

"authorities, and, therefore, whoever, by virtue of public "position under a State government, deprives another of "any right protected by that amendment against depri- "vation by the State 'violates the constitutional inhibi- "tion; and as he acts in the name and for the State, and is "clothed with the State's power, his act is that of the "State.' This must be so, or, as we have often said, the "constitutional prohibition has no meaning, and 'the "State has clothed one of its agents with power to annul "or evade it.'" (Page 233.)

This case also shows clearly the searching power of this Court when investigating a claim that a citizen has been deprived of life, liberty or property without due process of law. The Court says:

"Nor is the contention that the railroad company has "been deprived of its property without due process of law "entirely met by the suggestion that it had due notice of "the proceedings for condemnation, appeared in court, and "was admitted to make defense. . . . But a State may not, "by any of its agencies, disregard the prohibitions of the "Fourteenth Amendment. Its judicial authorities may "keep within the letter of the statute prescribing forms of "procedure in the courts, and give the parties interested "the fullest opportunity to be heard, and yet it might be "that its final action would be inconsistent with that "amendment. In determining what is due process of law, "regard must be had to substance and not to form." (Page 234.)

So in Scott vs. McNeal, 154 U. S., 34, this Court, in referring to the prohibitions of the Fourteenth Amendment, said:

"These prohibitions extend to all acts of the State, "whether through its legislative, its executive, or its

"judicial authorities. (Citing authorities.) And the first "one, as said by Chief Justice Waite in United States vs. "Cruikshank, 92 U. S., 542, 554, repeating the words of "Mr. Justice Johnson in Bank of Columbia vs. Okely, 4 "Wheat., 235, 244, was intended 'to secure the individual "from the arbitrary exercise of the powers of government, "unrestrained by the established principles of private "rights and distributive justice.'" (Page 45.)

In *ex parte* Virginia, 100 U. S., 339, this Court said:

"We have said the prohibitions of the Fourteenth "Amendment are addressed to the State. . . . They have "reference to actions of the political body denominated a "State, by whatever instruments or in whatever modes "that action may be taken. A State acts by its legislative, "its executive, or its judicial authorities. It can act in no "other way. . . . Whoever, by virtue of public position "under a State government, deprives another of property, "life, or liberty, without due process of law, or denies or "takes away the equal protection of the laws, violates the "the constitutional inhibition; and as he acts in the name "and for the State, and is clothed with the State's power, "his act is that of the State. . . .

"We do not perceive how holding an office under a "State, and claiming to act for the State, can relieve the "holder from obligation to obey the Constitution of the "United States." (Pages 346 to 348.)

In Chicago, Burlington, etc., R. R. Co. vs. Chicago, 166 U. S., above referred to, the special subject of the Court's inquiry was the judgment of a State Court which was claimed to have deprived a person of property without due process of law. In the case of Scott vs. McNeal, 154 U. S., also referred to above, it was again claimed that the judgment of a State Court had deprived a person of his property without due

process of law; and this Court so held; and therefore reversed a judgment of a State Court where the former judgment had been relied on and attacked on the ground mentioned. In Village of Norwood vs. Baker, 172 U. S., 269, this Court held that an ordinance of the Village of Norwood assessing the cost of a local improvement upon certain land which was not benefitted by the improvement, was the taking of property without due process of law, and was therefore void. And hence the Court affirmed a judgment of the United States Circuit Court enjoining the village from enforcing the assessment. It will be observed that the act here stricken down by the judgment of this Court was the action of a town council, an act of a quasi judicial nature.

In Missouri Pacific Railway vs. Nebraska, 164 U. S., 403, the Board of Transportation of the State of Nebraska had made an order commanding the Missouri Pacific Railway Company to allow certain persons to erect an elevator on its right of way for their use. Suit was brought in a State Court to enforce this order. The Court did enforce it. And this Court reversed the judgment, on the ground that the order of the Board of Transportation was in effect a taking of property without due process of law, and was therefore void and *should not be enforced.*

We might continue at great length to cite cases where this Court has enforced the provisions of the Federal Constitution by declaring void, and thus nullifying, the action of *each of the three departments* of the State government, sometimes releasing a prisoner on *habeas corpus*; sometimes enjoining proceedings to enforce an arbitrary act of the State government; sometimes proceeding by a writ of error to reverse a judgment of a State court upholding and enforcing such act, and in other ways.

The authorities cited, and others which might be cited, show that this Court has never considered itself concluded on the question of whether or not a proceeding was due process

of law, by the judgment of the State tribunal, whether it be a State legislature, a State court, or a State executive officer.

In Davidson vs. New Orleans, 96 U. S., this Court uses the following significant language:

> "Can a State make anything due process of law which "by its own legislation it chooses to declare such? To "affirm this is to hold that the prohibition to the States is "of no avail or has no application where the invasion of "private rights is effected under the forms of State legisla "tion." (Page 102.)

And in the case already referred to of C., B. & Q. R. R. Co. vs. Chicago, 166 U. S., 235, the Court, after quoting the above language from Davidson vs. New Orleans, says:

> "The same question could be propounded and the same "answer should be made in reference to judicial proceed- "ings inconsistent with the requirement of due process of "law."

From these considerations it must be manifest that the claim of immunity from judicial inquiry, the claim to a conclusive presumption that "all is well," which was made and allowed in the State Court in favor of this alleged legislative "adjudication," can not be allowed here. It receives no peculiar sanction from the fact that it is claimed to be the action of the General Assembly. Neither the General Assembly itself, nor the Court of Appeals, in aid of it, can say "this was due process of law, because we have said so," and thereby deprive this Court of the power to inquire into the matter for itself.

In order for the Court to determine for itself whether or not the proceedings, now sought to be enforced herein, did constitute due process of law, or did violate any right secured by the Constitution of the United States to the parties com-

plaining, it becomes manifestly necessary to look into those proceedings and see what they were. If they can not be examined it can never be known whether they were due process of law or not.

IV.

The Alleged Legislative Adjudication.

As said in the beginning, this case comes to this Court practically on a petition and answer. The answer was demurred to, in a fragmentary way it is true, but the orders of the Court show the demurrer was to practically the whole answer, and it was sustained. (Rec. 1, p. 63.) The *facts* therefore are indisputed, and it is for this Court to say whether or not *the facts thus alleged* are sufficient to show that the alleged legislative "adjudication," now sought to be enforced herein, was made in violation of rights secured by the Federal Constitution. (Cov. & Lex. Turnpike vs. Sanford, 164 U. S., 595.)

We accept the construction by the State Court of the Constitution and statute of the State as to the respective duties and powers of the Contest Committee, or Board, and the General Assembly itself. As heretofore said, when we alleged that the Committee, or Board, was "packed" for Goebel; that many of its members had acted as counsel for Goebel, advising and urging him to make the contest; that others had contests on hand themselves over their own seats in the Assembly, in which the same questions were involved as were involved in the Goebel contest; that their rulings were flagrantly partisan and contradictory to each other; that they refused to hear argument, etc., the Court responded in effect that all this was of no moment, that the Committee was merely an advance agent to "take evidence and report the facts to the General Assembly;" and that "the Assembly itself finally determined the contest." (Rec. 1, p. 153.)

And in this connection it must be remembered that as a necessary sequence from the proposition that the prohibitions of the Fourteenth Amendment apply to all the departments of State government, it follows that a statute may be fair on its face, and yet its *administration* may be held to violate fundamental rights. The Court has so held:

"Though the law itself be fair on its face and impartial "in appearance, yet, if it is applied and administered by "public authority with an evil eye and an unequal hand, "so as practically to make unjust and illegal discrimina- "tions between persons in similar circumstances, material "to their rights, the denial of equal justice is still within "the prohibition of the Constitution."

Of course the principle is the same whether the objection is, that equal protection of the law has been denied, or that any other guaranteed right has been viol[illegible]

The effect of this construction of the law is that the proceedings before the Committee really do not constitute a trial at all—hence it makes no difference whether the members of the Committee are qualified or disqualified, partial or impartial, fair or unfair. But while this minimizes the importance of the Committee's actions, it vastly aggrandizes the importance of the actions of the General Assembly, and shows that under the law the only *real trial* of this great contest, in which such momentous interests were involved, was to be had before the General Assembly itself.

As to the nature of the *question to be tried* there can be, and is, no dispute. It was simply the question of who received the highest number of legal votes. The Constitution, on the subject of the election of a Governor, says:

"The person having the highest number of votes shall "be Governor." (Sec. 70.)

And again it says:

"Contested elections for Governor and Lieutenant-"Governor shall be determined by both houses of the "General Assembly, according to such regulations as may "be established by law." (Sec. 90.)

These regulations are set forth in the statute given in the appendix.

The official returns showed that Taylor had received the highest number of votes by 2,383. To show otherwise required evidence. And accordingly, in speaking of the question to be tried by the General Assembly, the Court of Appeals says, it was "*a question requiring evidence for its proper determination.*" (Rec. 1, p. 151.)

Remembering then these settled propositions (1) that the trial was to be by and before the General Assembly; (2) that the question was, who received the highest number of legal

votes? (3) that this was a question "requiring evidence for its proper determination;" and (4) that the official returns showed Taylor had received the highest number of votes by 2,383, let us inquire what are the facts as to this alleged trial by the General Assembly, the "adjudication" of which is plead as the foundation of this action.

Among other things it is *alleged* and *admitted* that:

A. The General Assembly had not a word of evidence before it, when it acted. No evidence was ever returned to it by the Committee which "heard" it. The members of the Assembly "acted without any knowledge of the facts as to said contests," and without any opportunity to form a judgment on the merits thereof; but acted arbitrarily, without knowledge and merely because they desired to see Taylor and Marshall deprived of their offices. (Rec. 1, pp. 41 and 43.)

B. This alleged trial was had at a *secret meeting*, one held *without any notice* either to Taylor or to Marshall, or to *a single Republican member of the body itself*, and without any opportunity to any of these parties to be present. The Republican members, thus excluded, constituted *more than one-third* of the entire membership of the Assembly. (Rec. 1, p. 42.)

C. The remarkable result was simply due to the fact, and it is a fact, that, before the contest was begun, it was arranged and agreed between Goebel and the members of the General Assembly, that the contest should and would be decided in his favor.

We will consider these grounds before proceeding to cite others.

A.

NO EVIDENCE.

On the subject of whether or not there was any evidence before the General Assembly when it pretended to make the "adjudication" sought to be enforced herein, the answer makes the following plain statement:

"Defendants further say that if the said Contest Committees did go through the form of making their aforesaid reports to any number of members of the General Assembly on either of the days aforesaid, and if the said members of the General Assembly did go through the form of adopting said reports or declaring the contestants, William Goebel and J. C. W. Beckham, respectively Governor and Lieutenant-Governor of the State, *the said reports were not accompanied by any statement of the evidence heard by said Committees* or the grounds of their action or finding, and the said members of the General Assembly, if they acted on said reports, *acted without any knowledge of the facts as to said contests*, and without considering what the facts were, and without endeavoring to form any judgment upon the merits of the said contests, and without even an opportunity to form such judgment, if they had been so disposed, but they acted, if they acted at all, purely arbitrarily without knowledge of the facts and merely because they desired to see these defendants deprived of the offices aforesaid and to see the said contestants given the said offices, pursuant to the agreement and conspiracy to that effect which had been formed before said contests were heard or determined, as heretofore stated." (Rec. 1, p. 41.)

And again as to an alleged "ratification" on February 19th and 20th of the preceding "adjudication" of February 2d, the answer makes the following statement, to-wit:

"And the actions of the said members of the General Assembly on those two days were without any regard whatever to the evidence or knowledge thereof, *and without having any evidence before them, no evidence having ever been returned by said Contest Boards*, and without any consideration of either the law or the facts bearing upon said contests." (Rec. 1, p. 43.)

Now the General Assembly was to try a contest between two parties over a question of right. This was the only power it had. The question was one which required evidence for its proper determination. It was one which could not be determined without evidence. Omniscience is an attribute of the Creator, but he has not imparted it to his creatures. We know that the judicial power to determine a question of fact simply can not be exercised without the evidence upon which the determination must depend. It is an impossibility. This General Assembly, however, when it pretended to make the adjudication sought to be enforced herein, had no evidence before it. Yet it pretended to "adjudge and determine" a question of fact.

The Constitution adopted by the people says "the person having the highest number of votes shall be Governor." The official returns from the election, as certified by the State Board of Election Commissioners, showed that "William S. Taylor received the highest number of votes given for that office." (Rec. 1, p. 17.) But the General Assembly, without any evidence before it, "adjudged and determined" that William Goebel received the highest number of legal votes; whereupon he was declared to be Governor. This was not an adjudication of a contest over a question of who received the highest number of votes. It was an *appointment* of a Governor.

There was *no basis* for an adjudication to this effect. The *prima facie* right was admittedly with Taylor. This was

denied on specific grounds set forth in a notice of contest. (Rec. 1, p. 19.) These grounds were specifically controverted (Rec. 1, p. 30)—though the law does not require this—*and there was no proof.* Yet, under such conditions, the General Assembly "declared" that William Goebel was Governor of the Commonwealth. (Rec. 1, p. 88.)

This is the "adjudication and determination" which the Court is asked to enforce against William S. Taylor and the people of Kentucky. It is a mockery, a travesty, to call it an "adjudication."

The power vested by the Constitution in this body was a power of trial, and not a power of appointment; a power, the exercise of which, as said by the Court of Appeals, required evidence as a basis of action. The assembly in this matter was a tribunal of special and limited jurisdiction. It had no jurisdiction to try without evidence a question which could only be tried with evidence. And when it proceeded, without evidence, to declare William Goebel Governor, it was simply proceeding beyond its jurisdiction.

In the case of Kilbourn vs. Thompson, 103 U. S., 168, 197, where the lower House of Congress attempted to punish a man for contempt, this Court said:

> "But we do not concede that the Houses of Congress "possess this general power of punishing for contempt. "The cases in which they can do this are very limited, as "we have already attempted to show. If they are proceed-"ing in a matter beyond their legitimate cognizance, "we are of opinion that this can be shown, and we can "not give any assent to the principle that, *by the mere act* "*of asserting* a person to be guilty of a contempt, they "thereby establish their right to fine and imprison him, "beyond the power of any court or any other tribunal "whatever to inquire into the grounds on which the order "was made. This necessarily grows out of the nature of

"an authority which can only exist in a limited class of "cases, or under special circumstances; otherwise the "limitation is unavailing and the power omnipotent. "The tendency of modern decisions everywhere is to the "doctrine that the jurisdiction of a court or other tribunal "to render a judgment affecting individual rights is always "open to inquiry, when the judgment is relied on in any "proceeding." (Page 197.)

Neither is it true that in a matter wherein a court, or tribunal acting in a judicial capacity, has jurisdiction it can then do as it may please. In the case of Windsor vs. McVeigh, 103 U. S., 274, heretofore quoted, this Court said:

"The doctrine invoked by counsel, that where a court "has once acquired jurisdiction it has a right to decide "every question which arises in the cause, and its judg- "ment, however erroneous, can not be collaterally assailed, "is undoubtedly correct as a general proposition, but, like "all general propositions, is subject to many qualifications "in its application. All courts, even the highest, are more "or less limited in their jurisdiction: they are limited to "particular classes of actions, such as civil or criminal; or "to particular modes of administering relief, such as legal "or equitable; or to transactions of a special character, "such as arise on navigable waters, or relate to the testa- "mentary disposition of estates; or to the use of particular "process in the enforcement of their judgments. (Norton "vs. Meador, Circuit Court for California.) Though the "Court may possess jurisdiction of a cause, of the subject- "matter, and of the parties, it is still limited in its *modes* "*of procedure*, and in the extent and character of its judg- "ments. *It must act judicially in all things*, and can not "then transcend the power conferred by the law. . . . If "the action be for a libel or personal tort, the Court can "not order in the case a specific performance of a con-

"tract. . . . Instances of this kind show that the general "doctrine stated by counsel is subject to many qualifica- "tions. The judgments mentioned, given in the cases "supposed, would not be merely erroneous; they would be "absolutely void: because the Court in rendering them "would transcend the limits of its authority in those "cases." (Page 282.)

And so upon the principle involved in the foregoing quotation, this Court in the case of Reynolds vs. Stockton, 140 U. S., 254, held that a judgment which is in no way responsive to the pleading in a cause is void. And the same thing exactly has been held by the Court of Appeals of Kentucky. (Allsmiller vs. Freuchenicht, 86 Ky., 198.)

Now why should pleading be so much more sacred than proof? Can it be said, where a tribunal exercising a limited judicial jurisdiction, pretends to determine *a disputed question of fact, in favor of one who has the burden of proof*, and when it has *no evidence before it*, that it has acted according to the principle asserted in Windsor vs. McVeigh that, "It must act judicially in all things."

We submit that the pretended adjudication was absolutely void; that it was not the exercise of the power committed to this body, as construed by the Court of Appeals; it was not the exercise at all of the power of adjudication; the opportunity for the exercise of that power was not presented; it was the exercise of the unauthorized power of appointment, a power like that which the Electoral College exercises when it chooses a President. But as no one claims that the people of Kentucky have ever committed to this body any power of appointing a Governor, the act was therefore simply an act of arbitrary power, done in the name of the State, by an agency of the State, whereby, if enforced, the people will be deprived of the liberty of choosing their Governor, and Taylor will be deprived of the right to an office of high honor and emolument.

How does the Court of Appeals avoid this result? Its reasoning is as follows:

"As it was a question requiring evidence for its proper "determination, *it must be presumed that the Legislature* "*did its duty*, and had before it such evidence as was satis- "factory to it." (Rec. 1, p. 151.)

In other words, the General Assembly can do no wrong.

Of course, if this conclusive presumption of right-doing is to prevail, then there is an end of all inquiry. If, when the citizen complains that his rights have been taken from him by an arbitrary act on the part of some department of the government, and without due process of law, the Court is to indulge in the conclusive presumption that the tribunal charged with the wrong did its full duty, then of course no relief can be had. But we believe we have shown in the foregoing part of this brief that no such conclusive presumption exists in favor of any officer, or any tribunal, when the citizen claims that by him or it he has been deprived of his lawful rights without due process of law.

The Court in its opinion does not accurately state the facts as to the manner in which this question arises on the record. The Court says that because the journals do not show any evidence to have been returned, and because the report of the Committee does not purport to return any evidence, that it is *therefore* insisted that the General Assembly acted without evidence. We have heretofore quoted the allegations of the answer on this subject, from which it will be seen that the answer is not thus argumentative. It makes the direct and positive allegation that *no evidence was returned.* It is true the report fails to show that any evidence was returned with it; and it is true that the journals fail to show that any evidence was returned; and it is true that in the action taken by the General Assembly, as exhibited

by the journals, no allusion is made to any evidence as having been received or considered; and it is true that all this lends silent and convincing support to the allegation of the answer; but that allegation is not an argument; it is the *positive assertion of a fact*, because it is a fact, that no evidence was returned or considered.

Again the Court, after presuming that the evidence was returned, because the Assembly could not have lawfully acted without it, further presumes that the members not only had this evidence before them, but received information concerning it from the members of the Committee. The Court says there is nothing in the record "to raise the presumption" that this was not true. We have not sought to raise a presumption. We have directly alleged the fact that the General Assembly had neither evidence before it, nor knowledge of the facts, but acted without knowledge, without evidence, and without any opportunity to form a judgment upon the subject.

The Court quotes Cooley's Constitutional Limitations to the effect that when evidence is required it must be supposed the Legislature had it. But the very quotation itself shows on its face that Judge Cooley is speaking of the Legislature when acting in its ordinary law-making capacity of passing acts, and not when it is acting in a limited judicial capacity in determining a disputed question of existing right between two rival claimants.

And it is well understood that legislatures, proceeding with the business of legislation, do not gather their information as courts are required to do. They proceed upon information, upon hearsay, frequently in simple obedience to public opinion, all of which is wholly inadmissible in the exercise of the judicial capacity, where the existing rights, or claims of existing right, of individuals are to be tried and determined.

The Legislature is given no power to "enact" or to "pass" a Governor, but simply to decide a question of existing right between two claimants—a decision upon the correctness of which depends the question of whether or not the people shall be represented by the officer they have chosen; and, as Chief Justice Marshall in Marbury vs. Madison, heretofore quoted, shows that this right to an office, not subject to the power of revocation or discretionary removal, is a vested legal right, so is the right of the citizen to vote and to vote with effect.

Of course it will be observed that the foregoing considerations do not rest to any extent on the charge of fraud, although that allegation is made in the answer, and will be hereafter noticed. Hence, authorities about inquiring into the motives of members of the General Assembly are not now in place. For the present we speak simply of the fact that the act under consideration was an arbitrary edict and not an adjudication. For the present we care nothing for the motive, it may have been a fraud or it may have been mere "sport."

Neither does the allegation that there was no evidence before the General Assembly involve any *contradiction of the journal.* Hence authorities on the verity of journals have no application. So far from the journals contradicting the allegation that there was no evidence returned to the General Assembly they support it, for they show none.

The Court of Appeals says, however, that "in those States where the *enrolled bill* is not held conclusive, it is uniformly held, where the journals are merely silent, that the presumption is absolute that the required steps were in fact taken." In the first place, this is incorrect as a statement of fact. Some courts hold that as the journals are required to show what occurred, therefore silence of the journal as to a suggested occurrence is taken as conclusive evidence that it did not occur. Cohn vs. Kingsley (Idaho), 49 Pac. Rep., 985.

But, however that may be, we are not dealing here with an "enrolled bill," but with a pretended "judgment" disposing of an existing right, or at least claim of a right secured by the Constitution. And, as heretofore said, if the Court is to indulge an "absolute" presumption, even from mere silence of the journal, that the Legislature in passing judgment on a contest did exactly what was right and no more, then all inquiry stops, and the Court is shorn of any power to find out whether or not the proceedings complained of were due process of law, for it cannot learn what the proceedings were.

In the same connection the Court of Appeals refers to McCulloch vs. the State, 11 Ind., 433, where the Court likens the presumption indulged in support of the actions of the Legislature, to presumptions in support of the proceedings of courts; and says it has been repeatedly decided that where the record of a court, possessing general powers, is silent as to whether a party defendant had notice of suit, it will be presumed that the steps necessary to give jurisdiction of the person were properly taken. But does any one contend at this day, and in this court, that where the record of a court of general jurisdiction is silent as to whether or not a defendant was served with notice, it will be *conclusively* presumed that he had notice, and that he will be denied the liberty of showing that he did not have notice? We take it this will hardly be contended for. (Pennoyer vs. Neff, 95 U. S., 714, 732.)

We hope that by this discussion in reviewing the opinion of the Court of Appeals, we have not drawn this Court's attention away from the bald fact, which is distinctly alleged and is not controverted by anything, and is admitted, that the grounds of contest specified in Goebel's notice of contest were specifically controverted; that there was not a word of evidence before the General Assembly to support them, though it was the tribunal that was really to try the

matter—conclusions of the Committee being of little moment —and yet, in the face of the official returns showing a majority of 2,383 for Taylor, and without a word of evidence to contradict or impeach them, the General Assembly has pretended to "adjudge and determine" that Goebel was elected; and this is the adjudication and determination which this Court is now called on to enforce, a merely arbitrary edict of this department of the State, depriving Taylor and the people of the State of sacred and valuable rights secured to them by the Federal Constitution.

B.

SECRET SESSION.

We have seen that the General Assembly was to hear, try, and determine the contest; that the proceedings before the Committee and its action were of little moment; we have seen that this "trial," resulting in the falsification and overthrowal of the official returns of the election, was without evidence, which was absolutely essential to such action; but we now proceed to state a still more remarkable feature of this alleged "trial" which resulted in the "adjudication" which the Court is now asked to enforce.

The session at which this was done (February 2d, as the judgment herein finds—Rec., p. 70) was a *secret session*, of which no notice, nor opportunity to be present, was given either to Taylor or to Marshall, whose rights or claims were to be tried and determined, nor to any of the Republican members of the Assembly itself, who constituted more than one-third of the entire body (53 out of 138.) These facts are specifically alleged and admitted. (Rec. 1, p. 42). *A secret trial*, without notice to the parties to be tried, and from participation in which all those members of the tribunal who are suspected of being friendly to the intended victims are

excluded! It is the "adjudication" resulting from this "trial" which this Court is asked to enforce, and which both Taylor and Marshall, again in their pleading in this immediate connection, claim was not due process of law, and which the people claim will, if enforced, deprive them of their political liberty, and of the benefits of a republican form of government, contrary to the Constitution of the United States. (Rec. 1, p. 42.)

To this it will be answered against *Taylor* that he had attempted to adjourn the Legislature on January 31st, which the Court of Appeals has held he had no power to do, and that he, by force, prevented the General Assembly from meeting in the Capitol buildings. And it is alleged that on January 31st he prevented them from meeting at two other public places in Frankfort, though it is not alleged that subsequent to January 31st he prevented them from meeting publicly anywhere except in the Capitol building. (Rec. 1, p. 6.) On this account it will be claimed Taylor forfeited all right to notice of the trial of his case on February 2d.

But passing for the moment the case of Taylor, how did Marshall forfeit his right to notice? No one claims that he ever did anything to forfeit the right to notice and an open trial. His case was absolutely distinct from Taylor's. The contestants were different; the contestees were different; the notices of contest were separate, though the same in form; the committees who took the evidence were different, though for convenience they sat together. In other words, the two contests were wholly distinct and separate. We have then the admitted fact that Marshall's case was tried, and his office taken from him, and he, the officer chosen by the people, was put out and another, not thus chosen, put in his place, by a pretended "adjudication" had at a *secret session* of certain members of the Assembly of which he had *no notice*, and at which he had *no opportunity to be present;* and there is no

suggestion of any act done by him to forfeit his right to such notice.

We will not laden the brief with authorities to show that a judgment without notice or hearing is void. Even in proceedings *in rem* notice of some kind, either actual or constructive, is essential. "The manner of the notification is immaterial, but the notification is indispensable." (Windsor vs. McVeigh, 93 U. S., 274-279.) Two thousand years ago Nicodemus asked of the Jewish Sanhedrim: "Doth our law judge any man before it hear him?"

But, furthermore, and what is just as important, how did Taylor's action, conceding it to be without authority, have the effect to destroy the right of the people to have all the members of the General Assembly present when the important question of who were their chosen officers was to be tried? Even if Taylor's mistake of judgment were cause of impeachment, this tribunal was not sitting as a Court of Impeachment. And if Taylor had been impeached and convicted, that would not have given the office to Goebel. These members of the Assembly at this secret session ousted Taylor and seated Goebel; pretended to "adjudge" that Goebel had received the highest number of legal votes by the people of Kentucky, and that he had been chosen by the people of the Commonwealth to be their Governor. They, the people, had a vital interest in this question, and whatever might have been Taylor's actions, the people had a right to have all the members of the Assembly present, or afforded an opportunity to be present, when any trial or adjudication was had to the effect that the official returns were all wrong, and that William Goebel had really been elected Governor, and J. C. W. Beckham Lieutenant-Governor.

We can not conceive it to be possible that such action taken at a *secret meeting*, of which more than one-third of the members of the body have no notice and no opportunity to be present, can have any legal force. Even in the com-

paratively unimportant matter of the meeting of corporate bodies the universal rule is that, except at the stated public meetings where the time and place of meeting are fixed by charter or by-law, notice and an opportunity to be present must be given to every member; for even though those not notified may be a minority, yet they are entitled to be present and use their influence with the others; and this is especially true of representative bodies like boards of directors.

It must be remembered that this lack of notice, or opportunity to be present, and the fact that the meeting was a secret meeting, are distinctly alleged, and are admitted. The question may be asked: What do the journals show as to the meeting? The showing is very significant. The meeting at which it is claimed the action was taken, and which the Court has fixed in its judgment, was February 2d. Now the journals of February *1st* show that each House adjourned, not to a fixed time, but *to meet at the call of its presiding officer*. The journal of the Senate shows that on February 1st it adjourned "*to meet on the call of Mr. Utley, presiding officer of the Senate;*" and that on February 2d, "at 2:30 o'clock P. M., the Senate *met on the call of Honorable Newton W. Utley, presiding officer of the Senate*, the President being absent." (Rec. 87.) The House journal of February 1st says the House adjourned to meet again "*at the call of the Speaker;*" and the journal of February 2d simply says "the House met at 2:30 P. M., and was called to order by Speaker Trimble." (Rec. 103.) *It does not even say it met on the call of the Speaker.*

The Republican members were never *called*. What such an adjournment means we are not able to say. We have been wholly unable to discover any authority or precedent for such an adjournment by a legislative body. There is certainly no law in Kentucky providing for it. The Houses in making the adjournment did not provide how the presiding officer should make the call. And, as heretofore said, the

answer expressly alleges that not a Republican member was notified or given an opportunity to be present, and that the same is true as to both Taylor and Marshall.

We therefore submit that on these grounds just considered the pretended "adjudication," which the Court is asked to enforce, was not due process of law, and was an utter nullity.

We confess there is suggestion of fitness in the failure to give notice of a meeting of a tribunal which was to try and to decide, *without evidence*, a question which could only be decided *upon evidence;* and, furthermore, that a contest, the success of which depended, as we will presently show, on disfranchising the people of a large part of the State, should be tried at a meeting of the Assembly from which the representatives of that same portion of the State were excluded.

C.

Agreement Between Judge and Litigant.

The pretended "adjudication" which the Court is asked to enforce did not result from the operation of hearing and determining, but was simply the result of an agreement, made before the contest began, between the supposed triers of the contest and one of the contestants, by which it was agreed that the contest should be decided in his favor. (Rec. 1, p. 8, 19 and 25.) It was *not the exercise of judgment, but the performance of a promise*. Is that due process of law? Is that according to the law of the land? Was that "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights?" (Pennoyer vs. Neff, 95 U. S., 733.)

The following is the plain and positive allegation of the answer (page 18), viz.:

"But defendants say that the Constitution of Kentucky provides that 'contested elections for Governor and Lieu-

tenant-Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law' (Sec. 90); and after the election of these defendants to the offices aforesaid a conspiracy was entered into by and between the aforesaid William Goebel and J. C. W. Beckham, and their agents and representatives, and a large number of the members-elect of the General Assembly of Kentucky, which met on January 2, 1900, in and by which it was agreed that if contests should be made by said Goebel and Beckham for said offices of Governor and Lieutenant-Governor, before said General Assembly or the Houses thereof, the said contests would be decided in favor of said contestants. Said agreement was entered into before said contests were heard or determined, as hereafter more fully set forth, and the decision of said contests was the result of said agreement." (Rec. 1, p. 18.)

It could hardly be expected that many authorities would be found on such a question as is here presented, but it is hard to conceive of such a mockery of justice being entitled to the appellations of "trial" and "judgment." And such, in an early case, was the expressed opinion of this Court, speaking through Chief Justice Marshall.

In the case of Slacum vs. Simms, 5 Cranch., 363, a surety, when sued upon the debt, pleaded a discharge granted by two magistrates under a Virginia statute. It turned out that the surety was himself one of the magistrates which had granted the discharge. Speaking on this subject the Court, through Chief Justice Marshall, said:

"It can not be doubted that if there had been a *com-*
"*bination* between the surety of the insolvent and the
"magistrate to grant the discharge, such surety could never
"plead that discharge in bar of this action. *Such would*
"*have been the law if Peter Wise, the surety, had been a*
"*different person from Peter Wise, the magistrate.* But

"being the same person, he is clearly incompetent. He is "directly interested, and his interest appears upon the "record."

As said by the Court of Appeals of New York in Oakley vs. Aspinwall, 3 N. Y., 549, etc.:

"The first idea in the administration of justice is that "a judge must necessarily be free from all bias and parti- "ality. He can not be both judge and party, arbiter and "advocate, in the same cause. Mankind are so agreed in "this principle that any departure from it shocks their "common sense and sentiment of justice."

Such an agreement as is alleged in the answer in the case at bar is an infinitely stronger reason for disqualifying one acting in a judicial capacity than mere relationship to one of the contestants, or even some pecuniary interest. It utterly puts out of play the faculty of judging.

Again the peculiar character of this tribunal must be considered. It was one of special and limited jurisdiction. There was no way of reviewing its proceedings by appeal or writ of error. And it was useless to appeal to the tribunal itself for relief, for its members were the guilty parties to the wrong. Therefore unless the enforcement of such a mockery of a judgment can be resisted when its enforcement is sought in the courts, there is no relief at all to be had, but the victims of the outrage must submit and allow it to pass as "due process of law."

But again we are met with the maxim, "The King can do no wrong." It is said that although an agreement, or, as Chief Justice Marshall calls it, "a combination," between the judge of a regular court and one of the contestants before him would render the pretended judgment a nullity, yet a peculiar sanctity doth hedge about these legislative judges, and it is not "seemly" to consider such charges against them. Again

it is said: will the judiciary arrogate all the purity of the world to itself with pharisaical piety? Of course the answer to the latter question is that it never has done so. It is conceded that if a judge prostitutes his office by an agreement to decide a case for a party, the pretended judgment when sought to be enforced, or in any manner relied on by that party, will be disregarded. The claim of a sanctity inviolate which is now made on behalf of the legislator acting as judge, could never be supported in favor of a real judge, and we can conceive of no reason why it should be upheld in favor of the legislative judge who undertakes to "adjudge and determine" the *rights of others.*

It may be true that when the Legislature is proceeding with its ordinary duties as law-makers in enacting laws, granting charters to corporations, and doing other acts in the exercise of a discretion confided to them, and which do not, and in their very nature cannot, dispose of the vested rights or claims to vested rights of any one, they are not answerable to any one, except their political constituents, for the faithful discharge of their duties. There is no chance here for the exercise of arbitrary power over the rights of any individual. But when in a peculiar case the law does invest the members of the Legislature with powers, judicial in their nature, to pass on contested claims of existing right, their proceedings are not immune from judicial inquiry when some one claims that they, acting for the State, have deprived him of liberty or property without due process of law, contrary to the provisions of the Federal Constitution.

We have spoken up to this point solely of the proceedings of the General Assembly, or alleged General Assembly, itself. We have shown that under the law, as construed by the Court of Appeals, the proceedings of the Committee were of little importance, and that the real trial was required to be before the General Assembly itself. And we have shown that the pretended trial there was at a *secret*

session, of which *no notice*, nor opportunity to be present, was given to either *Taylor or Marshall*, or to *any of the Republican members of the body itself*, constituting more than one-third of the membership. We have shown that it had no evidence before it, when pretending to hear and determine a question that it was impossible to determine without evidence. And in addition to all this we have shown that the alleged adjudication was made simply in execution of an agreement, made before the contest was instituted, to the effect that it should be decided in favor of the contestant. And we submit that the pretended "adjudication" thus made, and which this Court is now asked to enforce, would, if enforced, be a violation of the promised protection of "due process of law" which, in the language of this Court in Bank vs. Okely, 4 Wheat., 235, 244, approved in Hurtado vs. California, 110 U. S., 516, was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

Grounds of Contest.

Thus far we have not considered the proceedings before the Committee, because its action was of no moment, and the evidence taken by it was not returned to the General Assembly, and is, therefore, unimportant; but if we should consider its action, or consider that evidence as having been returned to the Assembly, then we confidently assert that, if either or both of the only two grounds of contest upon which the contest was really made at the hearing before the Committee, as shown by the evidence introduced, should be considered as in fact established, and Goebel or Beckham be installed in the Governor's chair on those grounds, or either of them, then beyond all question the people of Kentucky have, *by the State's own wrong*, been denied the privilege of

choosing a Governor, and have been thus deprived *by the State of Kentucky* of their political liberty and of the benefit of a Republican form of government.

As neither the Committee nor the General Assembly (supposing it to have had the evidence before it) gave any intimation as to which of the grounds of contest it found to be sustained, and as the validity of its action in declaring Goebel Governor may possibly depend on this point, we have a right to look into the procedure to see if we can tell on what ground it proceeded.

A question of this kind arose in Pennsylvania in the case of Jones vs. Jones, 12 Pa. St., 350.

An action of ejectment was brought to recover a tract of land. The question of title turned on the validity of a divorce granted by the Legislature of Pennsylvania. The Constitution of Pennsylvania provided that the Legislature should not grant a divorce on any ground upon which the courts were authorized to grant a divorce. In this particular case the act of the Legislature granting the divorce *did not state the ground on which it was granted.* The party opposing the validity of the divorce offered to prove, by the production of the papers filed before the Legislature, and possibly by other evidence, the ground on which the divorce was granted, and insisted that this was a ground over which *the courts* had jurisdiction and over which therefore the Legislature had no jurisdiction. It was strenuously insisted that this evidence was incompetent; that the Court *must presume* that the Legislature acted upon some ground upon which it had the right to act; and the lower court so held. The Supreme Court of Pennsylvania, however, reversed this judgment and in the course of the opinion the judge delivering it said:

"I place the decision on the broad ground that the "'*Constitution* must be preserved,' and that if the Courts "should refuse to permit evidence to show the grounds of

"the divorce, the Legislature could obliterate the clause in "the Constitution. *This is a question of property result-* "*ing from the divorce.* The party has a right to the pro- "tection of the constitutional provision, and if necessary, "the Court can touch the act with the judicial wand, and "open it to inspection, so as to see whether or not it is "within the pale of the Constitution." (Page 355.)

We ask the Court to touch the act under consideration with the judicial wand, open it to inspection and see if therein was due process of law, as required by the Federal Constitution.

And so we have already seen that this Court in Kilbourn vs. Thompson, 103 U. S., 197, decides practically the same proposition as to a House of Congress punishing for contempt; saying the Court would inquire into the "*grounds on which the order was made.*"

In C., B. & Q. R. R. Co. vs. Chicago, 166 U. S., 226, as we have seen, this Court also said:

> "Nor is the contention that the railroad company has "been deprived of its property without due process of law "entirely met by the suggestion that it had due notice of "the proceedings for condemnation, appeared in court, and "was permitted to make defense . . . . But a State may "not, *by any of its agencies*, disregard the prohibitions of "the Fourteenth Amendment. *Its judicial authorities may* "*keep within the letter of the statute prescribing forms of* "*procedure in the courts, and give the parties interested the* "*fullest opportunity to be heard, and yet it might be that its* "*final action would be inconsistent with that Amendment.* "*In determining what is due process of law regard must* "*be had to substance and not to form.*"

Then after quoting the language of the Court in Davidson vs. New Orleans, 96 U. S., 102, that a legislature can not

make anything due process of law which it chooses to call such, then says the same thing is true of a court.

In Wilson vs. North Carolina, 169 U. S., 586, a case so strongly relied on as an authority against us, the Court, after saying it would be "reluctant" to review the political administration of a State government, concludes its opinion with the following significant language, viz.:

> "The jurisdiction of this Court would only exist in "case there had been, by reason of the statute and pro- "ceedings under it, such a *plain and substantial departure* "from the fundamental principles upon which our govern- "ment is based, that it could with truth and propriety be "said that, if the judgment were suffered to remain, the "party aggrieved would be deprived of life, liberty or "property in violation of the provisions of the Federal "Constitution." (Page 596.)

And in an earlier case than either of those just cited, viz., *in re* Kemmler, 136 U. S., 436, this Court had said:

> "Undoubtedly the Amendment forbids any *arbitrary* "deprivation of life, liberty or property. . . . In order to "reverse the judgment of the highest Court of the State "of New York we should be compelled to hold that it had "committed an error *so gross* as to amount in law to a "denial by the State of due process of law to one accused "of crime." (Page 448.)

We cite these authorities to show that a State can not "*by any of its agencies* disregard the prohibitions of the Fourteenth Amendment"; that "the Constitution must be preserved"; that it is not satisfied with the mere "form of law"; that "in determining what is due process of law regard must be had to substance and not to form"; that a tribunal may by its *forms* keep "within the letter of law" and yet by its final action deny "due process of law."

With these principles before us we again ask you to "touch with the judicial wand" the alleged "adjudication" which is sought to be herein enforced, "open it to inspection, so as to see whether or not it is within the pale of the Constitution" of the United States.

Certainly we have a right to inspect the proceedings for the purpose of finding out, if we can, *on what ground* the remarkable conclusion was reached either by the Committee or the Assembly, supposing the evidence taken by the Committee to have been returned to the Assembly; for the ground of the action may, as in Jones vs. Jones, 12 Pa. St., *supra*, or in Kilbourn vs. Thompson, 103 U. S., *supra*, have a strong bearing on the validity of the action. And in this connection we ask the Court to remember that the alleged "adjudication" did not merely declare Taylor not to be Governor, but it declared Goebel to be Governor of Kentucky.

In the first place we know the action could not have proceeded upon any ground not set forth in the written notice of contest, for this the statute expressly forbids. It says:

> "The notice shall state the grounds of the contest, and "*none other shall afterwards be heard as coming from such* "*party*; but the contestee may make defense without "giving counter-notice." (Kentucky Statutes, Sec. 1535, Sub-Sec. 1.)

We can therefore exclude any possible ground not set forth in the notice.

Moreover no one can object if in this consideration we indulge *a presumption of honesty*. It does not lie in the mouth of the tribunal, or of him who claims under its action, to deny this presumption. Now the tribunal could not *honestly* have acted upon any ground of contest—though alleged in the notice—as to which there was *no evidence whatever* introduced in its support. Facts are sometimes

alleged by a pleader, which upon the trial he finds himself wholly unable to produce any evidence to support. So it was n this matter; there were ten paragraphs in the notice of contest, each one setting forth a different ground of contest. (Rec. 1, page 19.) But as to many of them there was not even a pretense of introducing evidence to support them.

The answer contains the following specific allegation, which is admitted by the demurrer, viz.:

"As to the fourth, fifth, eighth, ninth, and tenth grounds of contest set forth in said notice of contest, viz.: . . . there was *not a scintilla of evidence introduced before said committees.*

"*The only* grounds of contest *upon which there was any pretense of introducing evidence* were those set forth in the first, second, third, sixth and seventh paragraphs of the notice." (Rec. 1, p. 33.)

This is alleged as a fact in the answer. It is admitted as a fact by the demurrer. And it is shown to be a fact by the exhibit filed with the answer, which contains every word of testimony heard before the committees. (Vol. 2, 3, and 4; the direct evidence of the contestant being all in volume 2.) There is just one possible exception to the statement of the answer in this regard, which, in order to conform to exact truth ought possibly to be stated. *One* witness, speaking of *one* precinct, in *one* county, in the State, did say that *three* persons voted at that precinct whom he knew to be non-residents of the State, and that 176 persons voted there whom he did not know, and whom he believed to be not entitled to vote there. (Testimony of R. B. Bradley—Rec. 2, p. 56.) It may be contended that this was evidence tending to support the tenth ground of contest, viz.: that "many thousands of persons were unlaw-

fully brought into the Commonwealth, who were not entitled to vote at the said election" and were voted at the same. In drawing the answer we did not believe that the testimony of the witness referred to could be properly called a "scintilla" of evidence to support this tenth ground.

We are thus reduced certainly to the first, second, third, sixth and seventh grounds of contest.

The *seventh ground of contest* was an alleged conspiracy between the Republican party and the United States Marshal for the District of Kentucky to overawe and intimidate democratic voters. The answer alleges there was an utter failure of proof on this subject, "unless it should be deemed such evidence that it was publicly stated that all persons who should be guilty of any violations of the Federal laws as to intimidating negro voters, or conspiring to prevent them from voting, would be prosecuted for such violations of the law. And no person could possibly have been or was influenced by any such declaration, unless he was contemplating the performance of some acts forbidden by law as to the obstruction of negroes in their right to vote." (Rec. 1, p. 39.) This is alleged and admitted. In fact the only evidence introduced on this subject was the charge of a Federal Court to its grand jury, and the publication of that charge in the newspapers in the city of Louisville.

The *sixth ground of contest* was that in the counties of Knox, Lewis and Jefferson, election officers were compelled, by injunctions, to sign false certificates. The answer alleges that as to Lewis county not a scintilla of evidence was introduced. It further alleges that as to Knox and Jefferson counties there was not a scintilla of evidence to show that any officer was compelled to certify anything that was untrue; but that in Knox the County Board was simply ordered to canvass the returns and certify the result; and that in Jefferson the precinct officers in only *one precinct*, a precinct where they had failed to count the ballots, were ordered to count

them and certify the result, without directing them how. But the answer further alleges — and it is a matter of record—that in Knox county Taylor's returned majority was only 1,385, and in the one precinct referred to in Jefferson it was only 15, so that if these be *thrown out as requested*, it would only deduct 1,400 votes from Taylor's majority in the State; and as that was 2,383, *this would not change the result.*

The *third ground of contest* was the alleged wrongful issuing of a mandatory injunction by the Jefferson Circuit Court in Louisville, directing the admission into the polling places of certain persons not authorized to be there. But the answer alleged that it was shown in evidence that the matter here referred to was simply an order of injunction (which the contestant Goebel introduced in evidence—Rec. 2, p. 50) commanding the admission, *after the voting was over and the polls had closed*, of certain persons called "inspectors" merely to *witness the count*, without any power to determine how any vote should be counted, but simply to see if and how it was counted. (Rec., 1, p. 37.)

Indulging the presumption of honesty it can not be presumed, or believed, that the alleged "adjudication" sought to be herein enforced was based on either of the three grounds just mentioned, viz., the third, sixth or seventh.

By this process of exclusion we are reduced to the first and second grounds of contest, viz.: (1) Thin ballots in the mountain counties and (2) military intimidation in Louisville. And the slightest inspection of the record will show that they are the only two grounds on which the contest was really made. The entire evidence in chief of the contestant is contained in volume 2 of the Record which consists of 226 pages (exclusive of the contestee's counter-notice of contest which is bound in the beginning of this volume.) Now these 226 pages of evidence are distributed as follows, viz.:

Vote in Louisville:		
Pages 1 to 56	56	
Pages 124 to 175	51	
Pages 184 to 226	42	149
Thin Ballots:		
Pages 61 to 107	46	
Pages 112 to 125	13	
Pages 178 to 184	6	65
One witness as to three imported voters:		
Pages 56 to 61		5
Charge to Federal Grand Jury:		
Pages 107 to 112		5
Tabulated vote of the State by Counties:		
Pages 176 to 177		2
Total		226

It is proper to state, however, that included in the evidence tabulated above, relating to the city of Louisville, is the evidence as to the issue of the injunctions mentioned, including copies of the papers; and, likewise, a small part of the evidence tabulated as relating to the thin ballot counties refers to the injunction in Knox county, which was one of the alleged thin ballot counties.

We now proceed to consider the two real grounds of contest mentioned, and we repeat that if either Goebel or Beckham should be made Governor of Kentucky on either or both of those grounds, then, beyond all question, the people of Kentucky, *by the State's own wrong*, have been denied the privilege of choosing their Governor, and have thus been deprived *by the State of Kentucky* of their political liberty, and of the benefit of a republican form of government.

Thin Ballots.

Consider what is involved in this ground of contest (Rec. 1, pp. 20 and 34.) It is in substance that in forty named counties of the State (out of a total of 119) the official ballots which are required by law to be, and are in fact, *furnished by the State*, and upon which the voters are required to vote, or not vote at all, *were illegal* because on paper not as thick as the law required; and that therefore the election in all those forty counties—one-third of the State—should be declared void and the people in those counties refused any participation in the election, while the *remainder of the State* is allowed to elect the Governor *for the whole State.*

To have declared the whole election void on the ground that some of the ballots furnished the voters by the State itself were not quite thick enough, and thus to have deprived the people of the benefit of an election fairly won and thus force another trial, would be bad enough; but for the State thus, *on account of its own wrong*, to exclude one-third of the people from voting and at the same time allow the other two-thirds to elect the Governor for the whole State is *simply monstrous.*

The State, *through one of its agencies*, viz., the County Court Clerk, says to the people of these counties: "Here are the ballots upon which, and only upon which, you may vote." The people take them, and vote upon them; they are counted along with the ballots of the other people of the State, and it is found that of all the votes cast in the whole State William S. Taylor has received the highest number by 2,383. Then comes the State, *by another agency*, the General Assembly, and says to these same people: "The ballots we gave you were illegal, therefore we will not count them; you can not be heard to speak through them; and as the majority of the people of the remainder of the State prefer William

Goebel for Governor, we declare him to be Governor of the whole State—your Governor as well as theirs—and you shall have nothing to say upon the subject."

This is not law, it is tyranny; not the election of a Governor by the people of a republican State, but the selection of a chief ruler by an oligarchy. Yet if the people should rise in their might, believing themselves to be free, and resist this insolence in office, they would be suppressed by the Federal government. Will it then suppress the people and at the same time enforce the edict of their oppressors? Will it remember its promise to the State to aid in suppression of domestic violence, but forget its guaranty of republicanism to the people of the State? This promise and this guaranty stand hand in hand, interlocked in the same section of the Constitution. As said before, they are the complements of each other, and to destroy the one and leave the other, must be at the expense either of law or of liberty. And when an action at law is brought in one of the Courts of the State, *another of its agencies*, to enforce this action, this alleged "adjudication," and it is resisted on the ground that it is a violation of the Federal Constitution, and especially of the guaranty of the 4th Section of 4th Article thereof, we submit respectfully that this Court has the power, and it is its duty, to say "the Constitution must be preserved," and this action by the State which is sought to be judicially enforced, must not be enforced.

Again, no one denies that these people who, by this wrong on the part of the State, are refused the right to vote, are qualified voters. They are not refused on account of any wrong on their part, or lack of qualification in them. But *the State*, simply *by its own act*, prohibits from voting those who admitedly were entitled to vote, and proposes by this action to put over them as Governor one who, if they should be allowed to vote, would be defeated. This is a flagrant violation by the State of the Fourteenth Amendment, for

this Court in Minor vs. Happersett, 21 Wall., 162, as we have seen, says:

> "*The right of suffrage when granted will be protected.*
> "*He who has it can only be deprived of it by due process of*
> "*law, but in order to claim protection he must first show*
> "*that he has the right.*" (Page 176.)

The right of suffrage has been granted to the people of these counties; no one denies that the right exists; the Constitution of the United States protects it; the State through the conflicting action of two of its agencies has prohibited its exercise, and now, through another agency, proposes to judicially enforce this wrong upon the people. They appeal to the Constitution of the United States for protection.

Military Intimidation in Louisville.

This remaining ground of contest involves precisely the same principle as the one just considered. The only difference is that a *different agency* of the State was called into play.

This ground is thus set forth in the notice, viz.:

"Second. That the said election held in the county of Jefferson and city of Louisville, on the 7th day of November, 1899, was and is void, because the contestant says that upon that day before the said election, *the Governor of the Commonwealth* unlawfully called the military forces of the State into active service in said city, armed with rifles, bayonets and gatling guns, for the purposes of overawing, intimidating and keeping democratic voters from the polls thereof, and did himself, in violation of the law of the land, go to said city and county the day before said election and assume direction and command of the said military forces,

and ordered and directed them to go, and they did go, in obedience to said order, to the polling places in said city on the day of said election, and thereby many thousands of voters, viz., more than enough to have changed the result of said election, were intimidated and alarmed, and failed and refused to go to the polls, or to vote on said day; that for this cause the said election in the city of Louisville and county of Jefferson was not free and equal, but is void, and the said alleged votes cast thereat should not be counted." (Rec. 1, p. 20.)

For the sake of argument, suppose this to be true. "The Governor of the Commonwealth," the State, acting through its chief executive, is said to have unlawfully called out the military and prevented an election in the county of Jefferson, containing about one-tenth of the voting population of the State. (36,140 out of 397,185—see tabulated vote, Rec. 2, page 176.) The *State*, through the Governor, calls out the military, and then, *on account of that act*, the *State*, through the General Assembly, throws out the vote of the county. Thus the State, by the conflicting action of two of its agencies, and without any wrong done by the people, deprives over 36,000 of its qualified voters of the right to vote, of the right to participate in the election of a Governor. The people of that county of Jefferson constitute, as said above, about one-tenth of the voting population of the State, and they pay about one-fifth of all the taxes of the State; and yet, *by the State's own wrong*, it is proposed to forbid them any voice in the selection of the chief executive officer of the State, and one is seated as Governor who would be defeated if they were allowed to vote.

We will not repeat what we have already said in the next preceding part of the brief, as to the effect of this action. The principle is just the same as that we have heretofore discussed. In each case the action was that of the *State*,

and we may here repeat the words of this Court in *ex parte* Virginia, 100 U. S., 339, announcing the principle which has been so often announced since, viz.:

> "We have said the prohibitions of the Fourteenth "Amendment are addressed to the States. . . . They have "reference to actions of the political body denominated a "State, by whatever instruments or in whatever modes "that action may be taken. . . . Whoever, by virtue of "public position under a State government, deprives "another of property, life or liberty without due process "of law, or denies or takes away the equal protection of "the laws, violates the constitutional inhibition; and as he "acts in the name and for the State, and is clothed with "the State's power, *his act is that of the State.* This must "be so, or the constitutional prohibition has no meaning. "Then the State has clothed one of its agents with power "to annul or evade it." (Page 346.)

So, whether the alleged wrong consisted in the failure to furnish legal ballots or in military intimidation, it was the wrong of the *State*, whereby a large part of the electors of the State, enough to control the result—otherwise there would be no point in the contest—without any wrong on their part and without due process of law, are deprived of the right of suffrage. And therefore the action of the State through another department, *based on this wrongful deprivation*, and not merely declaring the election void and ordering another one, but taking advantage of the wrong to seat one as Governor of the State, who would be defeated but for this wrong, is itself the consummation of the wrong, is infected with its vice, and can not be judicially enforced.

The Court of Appeals of Kentucky has itself very lately and very emphatically, in a brief but pointed opinion, held that "where a considerable proportion of the electoracy has

been deprived of the right of suffrage," whether from a failure to furnish ballots or by force, the result is to nullify the election.

In Hocker vs. Pendleton, 100 Ky., 726 (decided February 23, 1897), the case of an election on the question of local option, the following is the Court's entire opinion, viz.:

"The question whether or not an election has been "'free and equal' in a constitutional sense (Constitution, "section 6) has usually arisen in cases where by force, "intimidation or the like a considerable proportion of "the electoracy has been deprived of the right of suffrage.

"It is clear, however, that an election may be free "from violence, and yet, if from a failure of the officers "to supply ballots, booths, stencils, etc., any large pro- "portion of the electors is prevented from voting, it "can properly be said there has not been a free and "equal election within the meaning of the Constitution.

"In this case there was an attempt to hold an election "on the question of the sale of spirituous liquors in the "town of Hartford. It is confessed that some 60 legally "qualified voters, out of a voting population of less than "175 in the town, were prevented from voting solely "'because the ballots furnished by the clerk gave out "by 9 o'clock on the morning of the election.'

"The Court below properly refused to uphold this "attempted election as valid, and the judgment is, there- "fore, affirmed."

Thus the Court recognizes a principle of rights and justice which is protected by the Federal Constitution.

If any distinction can be drawn between a failure to furnish ballots and furnishing illegal ballots, we are not astute enough to draw it.

On exactly the principle embodied in that case the election now under consideration was nullified if either of the

grounds on which this contest was made was sustained. Yet the General Assembly undertook, on account of the State's alleged wrongful action, not to declare the election void, but to seat as Governor one not elected by the people of the State; and it is this action which the Court is asked to enforce.

This action based on pretended military intimidation is all the more grievous and hard to be borne because the allegation is so absolutely and wholly untrue. Thus far we have made no allusion to the real truth as shown by the record on this subject. It is true there were more than a hundred pages of evidence on the subject, and therefore the answer could not say there was no evidence on the subject; but it does make the following allegation, which the exhibit filed with it shows to be true, viz.:

"Defendants say that on the trial of said contests there was no conflict in the evidence as to the actual movements of the military in the city of Louisville on the said election day. The evidence showed simply this and no more, to-wit, that on said date certain members of the military of the State, all of whom were citizens of Louisville, were held in the Armory in the city of Louisville, but that during the entire period while the vote was being cast said military was *not upon the streets* except when they went, without arms, to dinner to a hotel not more than two squares from the Armory, *passing no voting place in so doing*, and that the only time they appeared upon the streets with arms upon the election day was *between six and seven o'clock in the evening of the election day, which was about three hours after the voting had ceased* and the polls had closed, at which time they were called out to enforce certain orders of the Jefferson Circuit Court for the admission to the polls of inspectors whose right and duty it was to witness the count of the vote, and which orders of Court were being flagrantly violated;

but that even then the said military, when thus called out found all the polls to which they went *had been closed*, and that the duties of the officers had been completed, except in the case of *two polls*, as to which they found that the aforesaid inspectors had already been admitted, before the military got there, and which polls therefore they did not enter, and at which they disturbed no one at all.

"Not a single witness testified before said Contest Committees that he knew of a single person who had been kept from voting in the city of Louisville by reason of the presence of said military.

"Furthermore it was shown in evidence, and not contradicted, that the presence of the military in the city of Louisville on election day was not an unusual thing, but that for several years past it had been a common practice to have a military force held in readiness in the city of Louisville on election days for the purpose of preserving order and protecting property, which has been done both on occasions when Democrats were elected and when Republicans were elected." (Rec. 1, p. 36.)

It is true there was evidence of great excitement preceding the election, of wild newspaper talk on both sides, and of the admitted swearing in of a large number of special police by the democratic city officers; and some witnesses expressed the opinion that some people were intimidated. But no witness knew of anybody that was intimidated, or had ever heard of anybody that was intimidated. It was all simple talk of what was "in the air." The actual facts, however, as to the military were as stated in the answer, and as shown by the testimony of Major Gray, a witness for the contestants. (Rec. 2, p. 129.) And, as to the actual election, the following testimony of the democratic Mayor, Charles P. Weaver, the first witness called for the contestants, is a fair sample of what all stated, viz.:

"*Q.* You went, as I understand, all over the city? *A.* As far as I could go. *Q.* What time of day was that? *A.* I

left the city hall about 11 o'clock. *Q.* What time did you return? *A.* About half-past 4. *Q.* You saw no soldiers? *A.* No. *Q.* On the streets at all? *A.* No, sir. *Q.* Nothing of the kind? *A.* Nothing. *Q.* The polls closed at 4 o'clock, did they not? *A.* At 4 o'clock. *Q. I understand you to say that it was one of the most peaceful, quiet elections ever held in the city of Louisville? A. Yes, sir.*" (Rec. 2, p. 18.)

Even if we were dealing with the action of the Committee which had this evidence before it, or if the evidence had been returned to the Assembly by the Committee, and we were under such circumstances dealing with action of the Assembly, a finding on this record that the people of Louisville were intimidated by the military would come within the language of this Court, heretofore quoted, in C., B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226, viz.:

> "Its judicial authorities may keep within the letter of "the statute prescribing forms of procedure in the courts, "and give the parties interested the fullest opportunity to "be heard, and yet it might be that its final action would "be inconsistent with that amendment. In determining "what is due process of law, regard must be had to sub-"stance, and not to form." (Page 234.)

CONCLUSION.

We will not attempt any resume of the argument; we have attempted so to divide it as not to confuse it. We simply insist that the pretended "adjudication," which is pleaded by Mr. Beckham as the foundation of his action whereby he seeks to take from William S. Taylor and John Marshall the offices to which they certainly had the admitted *prima facie* right, and whereby he seeks to make himself the Governor of Kentucky and the chief magistrate of her peo-

ple, is an absolute nullity, that it was entered, or made, in violation of rights secured both to William S. Taylor and to John Marshall and to the people of Kentucky by the Constitution of the United States; and that when he comes into court asking for the judicial enforcement of this arbitrary edict, the courts of the land, of which this is the supreme head, should decline to enforce it.

We feel that in this case is involved the question of whether we are political freemen or political serfs; whether we have in Kentucky a republic or an oligarchy; whether we vote by right secured by law, or by grace of a few men. It matters not that these men may themselves have been elected. They were given no commission by the people to select a Governor for them; and as said by Mr. Jefferson, speaking for himself and his compatriots: "An elective despotism was not the government we fought for."

We have been denied republicanism, the principal has failed in its duty, and we call on the guarantor to make good its guaranty. We ask for the protection of liberty and property against "the arbitrary exercise of the powers of government".

April 24, 1900.

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APPENDIX.

Kentucky Statutes, Sec. 1596 A, Sub. 8.

8. *Contested election of Governor and Lieutenant-Governor.* When the election of a Governor or Lieutenant-Governor is contested, a board for determining the contest shall be formed in the manner following:

First. On the third day after the organization of the General Assembly which meets next after the election, the Senate shall select by lot three of its members, and the House of Representatives shall select by lot eight of its members, and the eleven so selected shall constitute a board, seven of whom shall have power to act.

Second. In making the selection by lot the name of each member present shall be written on a separate piece of paper, every such piece being as nearly similar to the other as may be. Each piece shall be rolled up so that the name thereon cannot be seen, nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and, after it has been well shaken and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the board.

Third. The members of the board so chosen by the two Houses shall be sworn by the Speaker of the House of Representatives to try the contested election, and give true judgment thereon, according to the evidence, unless dissolved before rendering judgment.

Fourth. The board shall, within twenty-four hours after its election, meet, appoint its chairman and assign a day for hearing the contest, and adjourn from day to day as its business may require.

Fifth. If any person so selected shall swear that he can not, without great personal inconvenience, serve on the board, or that he feels an undue bias for or against either of the parties, he may be excused by the House from which he was chosen from serving on the board, and if it appears that the person so selected is related to either party, or is liable to any other proper objection on the score of its partiality, he shall be excused.

Sixth. Any deficiency in the proper number so created shall be supplied by another draw from the box.

Seventh. The board shall have power to send for persons, papers and records, to issue attachments therefor, signed by its chairman or clerk, and issue commissions for taking proof.

Eighth. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the board. Where the person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered to fill the vacancy; *Provided* The first two years of his term shall not have expired. Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office.

Ninth. No decision shall be made but by the vote of six members. The decision of the board shall not be final nor conclusive. Such decision shall be reported to the two

Houses of the General Assembly, for the future action of the General Assembly. And the General Assembly shall then determine such contest.

Tenth. If a new election is required it shall be immediately ordered by proclamation of the Speaker of the House of Representatives to take place within six weeks thereafter, and on a day not sooner than thirty days thereafter.

Eleventh. When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and, if the office is not adjudged to another, it shall be deemed to be vacant.

Twelfth. If any member of the board wilfully fails to attend its sessions, he shall be reported to the House to which he belongs, and thereupon such House shall, in its discretion, punish him by fine and imprisonment, or both.

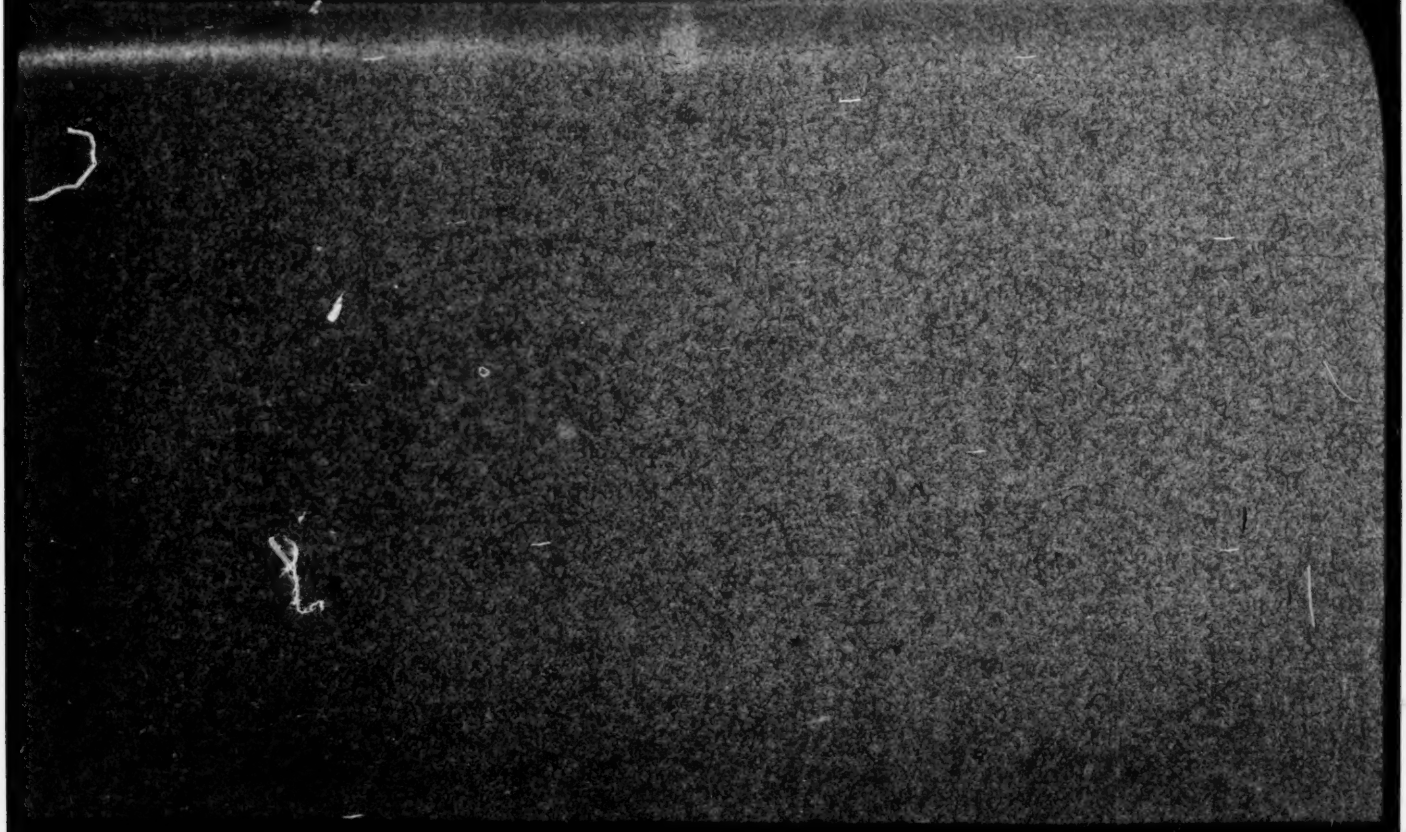
Thirteenth. If no decision of the board is given during the then session of the General Assembly it shall be dissolved, unless by joint resolution of the two Houses it is empowered to continue longer.

Supreme Court of the United States.

WILLIAM S. TAYLOR, &c., Plaintiffs in Error,
against
J. C. W. BECKHAM, &c., Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

W. O. BRADLEY,
Counsel for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES

WILLIAM S. TAYLOR, &c., Plaintiffs In Error,

AGAINST

J. C. W. BECKHAM, &c., Defendants In Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I. STATEMENT OF THE CASE.

More than a century elapsed in Kentucky before there was any contest of the elections of Governor and Lieutenant-Governor; and it is probable that such a contest would never have occurred but for the passage of the Goebel Election Bill, which has indeed proven the "fruitful source of all our woe."

That law enabled the General Assembly to, and it did, elect all the State Election Commissioners from the Democratic party. It enabled those commissioners to appoint all the county commissioners from their own political party, which was done in some instances, not more than one commissioner of the three having been appointed from the Republican party in any instance. These three county commissioners were in turn empowered to appoint the four election officers in each voting precinct equally from the two parties. In many localities all four of these officers were selected from the one party; in many others as many as three, while in some they were

equally divided, the Republicans, however, being chosen over the objections of the party organization.

In the appointment of county commissioners and precinct officers Republicans selected for their qualification and character by their party organization were generally ignored and others selected who were not qualified, or who could be controlled to act against their party. Many officers were appointed from both parties, who were of bad character, and the protests of the Republican organization were universally unheeded. Removals of Republican officers were indulged in lavishly the day preceding the election, and others appointed who would do the bidding of the democracy, in order that the machinery should work harmoniously in one direction. Although the statute required all precinct officers to be examined as to qualification, they were not examined in as many as one-half dozen counties of the State. In many localities no Republican inspector was allowed to be present at the count, the consequence of which was that thousands of votes cast for plaintiffs in error were counted for the opposition. In short, the election did not have even the semblance of decency or fairness. These facts were shown by the proof, but in many instances, notably in the county of Kenton, the home of Senator Goebel, the contest board, on demurrer, struck out all the charges, which demurrer admitted their truth. The court, by the most casual glance at the notice of counter contest, connected with the demurrer of contestants thereto, will become convinced that there never was in any State of the Union such a saturnalia of corruption.

Notwithstanding all the machinery was in the hands of one party, and was operated with conscienceless expertness and dispatch, Taylor and Marshall were elected by more than two thousand votes, and this, too, when the count in every county of the State, and in the State at large, was controlled by the Democratic party.

The State Board having issued certificates to the Republican candidates, a contest was inaugurated by the appellees, upon ten grounds. (Volume 1, page 19.)

Of the ten grounds, number one, two three and four are

directed at forty-four counties of the State, and it is alleged in the notice rendered the election void in those localities which, if true, would have necessitated a new election and prevented the deciding of the contest in favor of Mr. Goebel.

Of the remaining six counts, there was no attempt made to sustain numbers five, seven, eight and nine, and there was a complete failure as to numbers six and ten. Neither was any effort made to sustain number four. It will appear on investigation that the notice of contest not only precludes jurisdiction as to the points investigated, but fails to state the jurisdictional fact necessary to uphold it.

It will be shown that the Board and the General Assembly had no jursidiction to pass upon the questions at issue in one, two ~~and three~~, the only grounds that an attempt was made to substantiate, and upon which the decision of the contest was based. The only ground of contest specified in the statute governing the jurisdiction of the Board and of the Legislature which could have been presented was, and is, who received the highest number of legal votes given, and nowhere in the notice of contest was it ever claimed by Goebel or Beckham that they had received such vote.

The demurrer admits that the members of the Board were drawn by trick and device so that out of one hundred and thirty-eight members, fifty-three of whom were Republicans, and ten of whom were Democrats opposed to the contest, the Governor's Board was composed of ten Goebel Democrats and one Republican, and the Lieutenant-Governor's Board of nine Goebel Democrats and two Republicans. (1 Volume Record, pages 24-25, 59.) It is further admitted by demurrer that five of these members had attended a party meeting, in which the contest was advised and agreed upon; two had contests pending against them, in which the points at issue in this case were involved; one had a bet on the result of the election, which was being held up to await the decision of the Board; two had expressed in substance the opinion that contestants should succeed whatever might be the majority against them; another was under charge of felony for obtaining money under false pretenses, and that affidavits were filed with the Chair-

man of each Board, and also in both houses, making these statements, and objecting to said persons acting, which affidavits were ignored. (Record, 59.)

It is likewise admitted that only eight working days were allowed contestees to prepare to meet the issue presented in forty-five counties of the State, and to present their own case by counter contest, involving a large majority of the counties in the State. (1 Volume, page 29.) At the conclusion of contestee's testimony contestants were allowed to introduce evidence in chief, under the pretense of rebuttal, which is admitted to have been false, and time was refused contestees to meet and contradict the same, and hundreds of contestee's witnesses were turned away because of a refusal of reasonable time in which to enable them to testify. (Volume 1, pages 31-60.) It is further admitted that the Board of Contest refused to allow the contestees to argue the case, but made their report without argument. (Volume 1, page 32.)

It is shown by the journals, and so alleged in appellees' petition, that a majority of all the members in the Senate did not vote in favor of the contestants. (Volume 1, pages 40-1-2-3); that the report of the Contest Board was adopted by resolution, which resolution was never presented to the Governor for his signature, and that the proof taken by the Board was not filed with or considered by either house on the adoption of the report. It is charged in the pleadings, and admitted by demurrer, that there was in fact no public meetings of either house on the 31st of January or 2d of February; that the Senate had no presiding officer; that no notice of any such meeting was given, no one of those who opposed the report of the committee present, and that all the entries made on the journals concerning these matters were false and fraudulent, and made and entered in execution of a conspiracy between the clerks and members of the two houses.

And yet, in the face of all this infamy, a proceeding where every legal right has been disregarded and trampled under foot, where the will of the people has been openly defied, a

record whose every page is marked with the trail of the serpent and the mailed hand of the robber, we are told that in this free Republic there is no relief, but that every power is paralyzed and every tribunal silenced by the acts of this fraudulent, conscienceless and corrupt Legislature.

II. THE JURISDICTION OF THIS COURT.

In discussing whether or not this court has jurisdiction of the writ of error attention will be specifically directed to the grounds relied upon for reversal, which, taken in connection with the pleadings, the opinion of the Kentucky Court of Appeals and the Constitutions of the State and Nation demonstrate conclusively, the power of this court to break the chains forged in the white heat of corruption and party hate, which now bind not only the parties complaining, but the people of a Commonwealth as well.

The only authority possessed by the two houses to try such contests will be found in section 90, Constitution of Kentucky, which provides that—

> "Contested elections for Governor and Lieutenant-Governor shall be determined by BOTH houses of the General Assembly, *according to such regulations as may be established by law.*"

Under this section the election law of Kentucky, containing the regulations for determining such contested elections, defining the questions to be investigated and the jurisdiction of the Legislature, was adopted.

In determining the contests both houses are bound by these regulations, for they can act alone in accordance with them. It will be observed that the power conferred on the Legislature is not absolute, but subject to limitation in this, that it is to be exercised only under the regulations established by law.

1st. It is contended that under these regulations that the grounds on which the Contesting Board and the two houses acted in settling the contest were not embraced in the regu-

lations established by law, but were entirely outside the same, in consequence of which the action of the Board and the two houses was without any jurisdiction, and hence of no force or value. If it be contended that the tribunal thus selected had the right under the State Constitution to arbitrarily and without right deprive a citizen of his rights, privileges, immunities, property or liberty, then the State Constitution is in conflict with the 14th article of amendment to the Federal Constitution, and is a nullity.

Conceding, for the sake of argument, that the action of the two houses would be final, so long as it was confined to the execution of the powers conferred upon them, yet if they went outside the established regulations they acted without jurisdiction, and such proceeding was absolutely void.

In order to constitute due process of law there must have been:

1st. A tribunal clothed with jurisdiction of the subject and person.

2d. The tribunal having only a special jurisdiction, the notice of contest must have alleged and plainly set out the jurisdictional facts.

3d. The investigation must of necessity have been confined within the limitations fixed by the statute.

4th. The members of the Contest Board must have been fairly drawn.

5th. All members of the Board who were interested or partial should have been excused.

6th. Reasonable time must have been given contestees to prepare their cases and introduce their evidence.

7th. Contestees should have been afforded an opportunity to argue the case.

8th. The two houses before determining the contest must have read the evidence.

9th. The two houses in determining the contest must have acted in conformity to the law.

If the tribunal acted without jurisdiction, or if it failed, for any reason, to afford due process of law; and if by its action the rights, privileges or immunities of any citizen of the

United States has been abridged, or he deprived of his liberty, rights or property without due process of law, either by the law or the improper and unauthorized manner of its enforcement, the Constitution of the United States has been violated; and if it appears that the Federal question was raised and passed upon in express terms or by necessary effect, the jurisdiction of this court can not for a single moment be questioned.

That the Federal question was not only presented in the pleadings, but decided adversely to the plaintiffs in error by the majority opinion of the court below (1 Volume Record, page 153), there can be no question; and that plaintiffs in error could not have been divested of their offices except by disregarding a plain provision of the National Constitution there can be no doubt.

Section 709, United States Statutes, provides, among other things, that—

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question * * * the validity of a statute *or an authority exercised under any State*, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; *or where any title, right, privilege or immunity is claimed under the Constitution, and the decision is against the title, right, privilege or immunity especially set up or claimed* may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

It is entirely immaterial to the question of jurisdiction whether or not an office is property. An office is certainly both a right and a privilege of citizenship.

The Kentucky Court of Appeals held, in Page v. Hardin, 8 B. Mon., 672, that an office "is a valuable right and interest." Again, in Commonwealth v. Jones, 10 Bush, 735, it held that the section of the Constitution depriving one who has fought a duel of the right to hold an office:

> "In effect dispossesses him of a right which the Su-

preme Court of the United States terms inalienable (4 Wall, 321), takes from him 'rights, privileges and immunities' to which he was theretofore entitled, and strips him of one of the most valuable attributes of citizenship. The word 'deprived' is used in this section in the same sense in which it is used in section 12 of the Bill of Rights and in the fifth article of amendment to the Federal Constitution."

Said this court in Unites States v. Missouri, 4 Wall., 321:

"The theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions. are alike open to every one; and that in the protection of these rights all are equal before the law."

Again, at page 320, it is said:

"We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' * * * He does not include under 'liberty' freedom from outrage on the feelings as well as restraints on the person. He does not include under 'property' those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed may be punishment; disqualification from office may be punishment, as in cases of conviction upon impeachment."

It is true that in the present opinion the court below decides that an office is not property; but they seem to have forgotten, at any rate failed to mention, the cases in 2 Duvall and 81 Kentucky, wherein they have announced a contrary doctrine. As these decisions have not been expressly overruled or explained in the opinion in this case, we may assume that the court below is on record on both sides of the question, the de-

cided weight of authority being that an office is property. In the first-named case (Standiford v. Wingate, 2 Duvall, 445) the court forcibly draws the distinction between an office created by the Constitution, the term and salary of which may not be altered by the Legislature, and one created by the Legislature. But even as to the latter it is held that they are "in a peculiar sense and to a qualified extent property." Say the court, the Constitution does not give fixidity to the legislative offices, nor, consequently, stability to their tenure, and the sovereign people when they made their organic law were the best and only judges of the policy of such a rule, and their action should not be circumscribed by speculation. Continuing, the court declares:

> "The value of the qualified property in an office consists of its salary and its duration; and nothing is more conclusively adjudged than that neither element is secured by contract. And it is self-evident that they both depend on the popular will, *when by their Constitution the people have not surrendered their own power over them.*"

The inevitable conclusion from the opinion is that a Constitutional office, which may not be repealed or the salary altered, *is property*, the people having surrendered their power over it.

The present Constitution of Kentucky provides that the salary of the offices now in contest can not be increased or diminished during the term, and in addition creates both offices. Not only so, the Governor is furnished during his term with a valuable residence for himself and family.

In Bailey v. Commonwealth, 81 Ky., 401-2, the court below said:

> "This objection involves the startling doctrine that a public office is property, and that the acceptance of a public office by a citizen who has been elected thereto by the people is a contract between him and them, or the State, which so insures to him the fees and compensation

fixed by law for his official services that they can not be diminished during his incumbency.

"*This rule is not applicable to any public office unless the Constitution so provides.* The Constitution in order to render the judiciary independent, does provide that the compensation of the judges of the Appellate and Circuit Courts shall not be diminished during the time for which they shall have been elected; but no such provision can be found in the Constitution relative to clerks, marshals and other ministerial officers."

But we are told on the strength of the Sawyer case (124 U. S.) that the Supreme Court has held that an office is not property; and hence the Federal question presented in this case is untenable.

In that case the court was asked, on a writ of habeas corpus, to discharge the mayor and members of the city council of Lincoln, Nebraska, from custody on contempt proceedings for an alleged refusal to obey an injunction issued by the United States Circuit Court, on a petition of Parsons as police judge of Lincoln, against the mayor and council to prevent them from removing him from his office, on the ground that due process of law had not been afforded him. In passing upon the questions at issue the majority of the court, through Judge Field, held:

1st. The jurisdiction of a court of equity, unless enlarged by express statute, is limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. (Page 210.)

2d. That a court of equity has no jurisdiction over the appointment and removal of a public officer, but the jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal; or by mandamus, prohibition, quo warranto or information in the nature of quo warranto. (Page 212.)

3d. At page 220 the court emphatically decides:

"If a person claiming to be such an officer is by the

judgment of a court of the State, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court."

And this statement is made in the discussion of a case where a citizen was attempted to be deprived of an office.

At page 220 the court says:

"The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a Court of the United States and the officers in question are officers of a State. *If a person claiming to be such officer is, by the judgment of a court of the State, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.*"

Nowhere is it expressly decided in that case that an office is not property, but the whole effect of the decision is, while denying equitable jurisdiction, that in actions concerning removal from office the Supreme Court has jurisdiction, where the matters are presented on writ of error.

There is a difference of opinion in many of the States as to whether an office is or not property. It is not necessary, however, to enter into a discussion of this matter.

In Kennard v. Louisiana, 92 U. S., 480, the court, without questioning its jurisdiction to pass on the issue, and without intimating that an office was not property, or, if so, that the court had no jurisdiction, decided that due process of law was provided in Louisiana, and no complaint could on that account be made.

In Foster v. Kansas, 112 U. S., 201, the Kennard case was approved.

In Wilson v. North Carolina, 169 U. S, 594, the Kennard

case is approvingly cited, and the court passed upon the question, on writ of error, as to whether or not due process of law was afforded Wilson when deprived of his office.

In that case the only reference to an office as property is (595) that "the Supreme Court of North Carolina held that an office was generally, and in a certain restricted sense, the property of the incumbent, and that the incumbent, in taking it, holds it subject to the act creating it, which binds him by all its provisions, all of which were held to be valid." But in the Wilson case the court said, page 596: "We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a State government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been, *by reason of the statute and proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty or property in violation of provisions of the Federal Constitution.*"

In the Kennard case a hearing was granted, and it does not appear that ample time was not given, for only a legal proposition was presented.

In the Wilson case the office was a legislative office subject to repeal. True, the Governor had removed the commissioner without giving his reason or citing him to appear; but the effect of his order was only to suspend the commissioner until the meeting of the General Assembly, when he was entitled to be fully heard.

As already shown by the decisions, it is not necessary that an office should be property in order to invest this court with jurisdiction. It is a right, privilege and immunity. Rights, privileges and immunities spring from the liberty of the citizen and are a part of that liberty. Said this court in Munn v. Illinois, 94 U. S., 123, through Mr. Chief Justice Waite:

"The Constitution contains no definition of the word deprive, as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it when employed in the same or a like connection. While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly, or quite, all the Constitutions that have been from time to time adopted by the several States of the Union.

"By the fifth amendment it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth as a guarantee against *any encroachment upon an acknowledged right of citizenship by the Legislature of the States.*"

The language of the fourteenth amendment to the Federal Constitution, taken in connection with section 709, supra, when applied to the issues presented in the pleadings and passed upon by the court below, admit of no doubt as to the jurisdiction of this court to hear and determine the writ of error.

The amendment provides:

* * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

Said this court in the well-considered opinion, delivered through Mr. Justice Story, of Cromwell v. Randall, 10 Peters, 398, after reviewing the cases decided up to that time:

"The period seems now to have arrived in which the court should, upon a full view of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the

25th section of the judiciary act it must appear on the face of the record, first, that some one of the questions stated in that section did arise in the State court; second, that the question was decided by the State court as required in the same section; third, that it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, ipsissimus verbis; but that it is sufficient if it appears and by necessary intendment the question must have been raised and must have been decided in order to have induced the judgment; fourth, that it is not sufficient to show that a question might have arisen or been applicable to the case unless it is further shown, on the record, that it did arise and was applied by the State court to the case."

In Gray v. Coan, 154 U. S., 588, this court held, Mr. Chief Justice Chase delivering the opinion:

"To give this court jurisdiction over the judgment of the highest court of a State brought here by writ of error, it must appear that some question under the 25th section of the judiciary act was made by the pleadings or passed upon by the court."

Said Mr. Justice Miller, speaking for the court, in Bridge Proprietors v. Hoboken Co., 1 Wall, 116-143:

"The court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See Choteau v. Gibson, 111 U. S., 200; Murdock v. Memphis, 20 Wall, 590, 636; Brown v. Colorado, 106 U. S., 95-97; Detroit Railway Co. v. Guthard, 114 U. S., 135.

In Byrne v. State of Missouri, 8 Peters, 42, Mr. Chief Justice Marshall, speaking for the court, said:

"The pleadings in the cause bring the question, whether

the act of the State of Missouri, by virtue of which the certificates which form the consideration of the writing obligatory, on which the judgment of the State court was rendered, be constitutional or not, directly and plainly before the court, and the decision of the State court was in favor of its validity. Consequently the case is within the 25th section of the judicial act; and the only question before this court is, did the State court err in pronouncing that judgment?"

Said this court, through Mr. Chief Justice Fuller, in Clark v. Pennsylvania, 128 U. S., 397:

> "It is essential that the record should disclose not only that the alleged right, privilege or immunity was specially set up and claimed in the court below, but that the decision was against the right so set up or claimed."

In San Francisco v. Itsell, 138 U. S., 66, this court announced the rule through Mr. Justice Gray:

> "This court has no jurisdiction to review a judgment of the highest court of a State unless a Federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error."

In a recent decision, rendered March 12, 1900, this court said, Mr. Justice Brown speaking for the court (Illinois Central R. R. Co. v. Chicago):

> "In determining the existence of a Federal question it is only necessary to show that it is set up in good faith, and is not wholly destitute of merit."

Said Mr. Chief Justice Marshall, delivering the opinion of the court, in Cohens v. Virginia, 6 Wheaton, ~~114.~~ 404

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary can not, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We can not pass it by

> because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of a jurisdiction if it is given than to usurp that which is not given. ***The one or the other would be treason to the Constitution.*** Questions may occur which we would gladly avoid; but we can not avoid them."

The pleadings allege that the Contest Board and the two houses acted without jurisdiction; that the board was unfairly drawn, was interested and partial, as stated; that reasonable time was not allowed plaintiffs in error to prepare their case or introduce their testimony, and that they were denied an argument; that not only were the rights, privileges and immunities of plaintiffs in error abridged, but that they were deprived of same, together with their property and liberty, not only without due process, but without any process of law; that the action of the two houses was the exercise of absolute, arbitrary power, unauthorized by constitutional authority, the denial of all rules of procedure known to the courts, without any testimony and in violation of the Constitution of the State and Nation.

The Court of Appeals, in the majority opinion, in deciding the case against plaintiffs in error, necessarily held that due process of law had been afforded, and that the Constitution of the United States had not been violated in any way. But they specifically refer to our contention and hold that the action of the Legislature under the State Constitution did not abridge any of the rights, privileges or immunities of plaintiffs in error, or deprive them of their property without due process of law; and, consequently, that the fourteenth amendment to the Federal Constitution has not been violated.

Doubtless the opinion of this court in Luther v. Borden, 7 Howard, will be relied upon. An examination of the case will show that it has no bearing on the question in issue. In that instance two State Constitutions were claimed to have been adopted and two sets of officers elected. The State court had decided in favor of one of these governments and the President

had recognized one of them, and was taking steps to quell domestic violence. This court declined to interfere upon the ground that the question presented was purely political.

There is no contention here concerning dual governments in Kentucky. The only question presented is whether, under an amendment to the Constitution made long after the decision in Luther's case, a citizen of a State has been deprived of his rights, privileges, immunities or liberty without due process of law.

The sole question in the Luther case was whether the State of Rhode Island, through its sovereign people, had changed their old Constitution by adopting a new one.

As we have already seen, in Wilson v. North Carolina, 169 U. S., 595, this court held, that while it would be reluctant to decide that it had jurisdiction and thus to supervise the political administration of a State government by its own officials and through its own courts, still such jurisdiction would exist if the proceeding was in violation of the fourteenth amendment.

In Scott v. McNeal, 154 U. S., 45, this court, through Mr. Justice Gray, said:

> "Upon a writ of error to review the judgment of the highest court of a State, upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case this court must decide for itself the true construction of the statute."

Citing Huntington v. Attrill, 146 U. S., 657, 683, 684; Mobile & Ohio Railway v. Tennessee, 153 U. S., 486-492 to 495.

III. THE DENIAL OF DUE PROCESS OF LAW.

In determining whether or not due process of law was afforded the contestant, attention will first be directed to the question as to whether the legislative department is affected by the provisions of the fourteenth amendment:

Said this court in Scott v. McNeal, 154 U. S., 45, Mr. Justice Gray speaking for the court:

> "The fourteenth article of amendment of the Constitution of the United States * * * ordains 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to *all acts of the State, whether through its legislative, its executive or its judicial authorities.*
>
> "Virginia v. Rives, 100 U. S., 313, 318; Ex parte Virginia, 100 U. S., 339-346; Neal v. Delaware, 103 U. S., 370-397, and the first one, as said by Chief Justice Waite, in United States v. Cruikshank, 92 U. S., 542, 554, repeating the words of Mr. Justice Johnson, in Bank of Columbia v. Okeley, 4 Wheat., 235-244, was intended to secure the individual from the aribtrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In C., B. & Q. R. R. Co. v. Chicago, 166 U. S., 234, Mr. Justice Harlan, speaking for the court, said:

> "These principles were enforced in the recent case of Scott v. McNeal, 154 U. S., 34, in which it was held that the prohibitions of the fourteenth amendment extended to all acts of the State, whether through its legislative, its executive or its judicial authorities."

It is confidently contended that the two houses had no jurisdiction to try the contests under the statute, and even if they had, they had no jurisdiction under the pleadings.

If they acted without jurisdiction, it follows that due process of law was denied to the plaintiffs in error.

Said Mr. Justice Gray, speaking for the court, in Scott v. McNeal, 154 U. S., 46:

> "No judgment of a court is due process of law if rendered without jurisdiction in the court."

Suppose that the Constitution and statute of Kentucky were silent concerning the right to contest, or manner of contesting, the elections of Governor and Lieutenant-Governor, would it be contended for a moment that the Legislature would have the right to entertain or decide such a contest? Surely not. Then if authority be given in the State Constitution to hear and decide such contests, with the express limitation that such authority must be exercised "according to regulations established by law," and the Legislature acts outside and independent of those regulations, and assumes to decide the contest upon grounds not embraced in the regulations, its action is as illegal and void as if no authority whatever had ever been granted it concerning the subject. As forcibly said by Mr. Chief Justice Marshall, in Cohens v. Virginia, supra, "the court has no more right to decline the exercise of a jurisdiction if it is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

As we have seen, section 90, Kentucky Constitution, does not confer absolute and unconditional authority upon both houses to determine contested elections of Governor and Lieutenant-Governor, but provides the distinct condition that such determination shall be had "*according to such regulations as may be established by law.*"

What was intended by this limitation? Was it intended that the Legislature itself should be sole judge of whether it complied with the Constitution? If so, why place a limit upon its power to act? Surely the makers of the Constitution meant something by the insertion of this limitation. In Potter's Dwarris on Statutes and Constitutions, 842, it is well asked, "What would avail restrictions upon legislative power without some constitutional mode of enforcing their observance?"

After asking the question, the author proceeds to show that the power of enforcement is in the judiciary.

These regulations are established in section 8, act of March, 1898 (page 643, Kentucky Statutes, edition of 1899), which was enacted over the Governor's veto, and is known as the Goebel law. The portions of that law bearing on the questions at bar are as follows:

"Section 8. When the election of a Governor or Lieutenant-Governor is contested, a board for determining the contest shall be formed in the manner following:

"1st. On the third day after the organization of the General Assembly, which meets next after the election, the Senate shall select, by lot, three of its members, and the House shall select, by lot, eight of its members, and the eleven so selected shall constitute a board, seven of whom shall have power to act

"2d. In making the selection by lot, the name of each member present shall be written on a separate piece of paper, every such piece being as nearly similar to the other as may be. Each piece shall be rolled up so that the name thereon can not be seen, nor any particular piece be ascertained or selected by feeling. The whole so prepared shall be placed by the clerk in a box on his table, and after it has been well shaken and the papers therein well intermixed, the clerk shall draw out one paper, which shall be opened and read aloud by the presiding officer, and so on until the required number is obtained. The persons whose names are so drawn shall be members of the board.

"3d. The members of the board so chosen by the TWO houses shall be sworn by the Speaker of the House of Representatives to *try* the contested election and give *true judgment according to the evidence* unless dissolved before *rendering judgment.*

"4th. The board shall, within twenty-four hours after its election, meet, appoint its chairman and assign a day for hearing the contest, and adjourn from day to day as its business may require.

"5th. If any person so selected shall swear that he can not, without great personal inconvenience, serve on the

board, or that he feels an undue bias for or against either of the parties, *he may* be excused by the house from which he was chosen from serving on the board; and if it appears that the person so selected is related to either party, *or is liable to any other proper objection* on the score of his partiality, he shall be excused.

"6th. Any deficiency in the proper number so created shall be supplied by another drawn from the box.

"7th. The board shall have power to send for persons, papers and records, to issue attachments therefor, signed by its chairman or clerk, and issue commissions for taking proof.

"8th. Where it shall appear that the candidates receiving the highest number of votes given have received an equal number, the right to the office shall be determined by lot, under the direction of the board.

"Where the person returned is found not to be legally qualified to receive the office at the time of the election, a new election shall be ordered to fill the vacancy: Provided, The first two years of his term shall not have expired.

"*Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office.*

"9th. No decision shall be made but by the vote of six members. The decision of the board shall not be final nor conclusive. Such decision shall be reported to the TWO HOUSES of the General Assembly, for the future action of the General Assembly. And the General Assembly shall then determine such contest."

This is all the law on the subject applicable to the present controversy.

The court will observe that the law governing proceedings before the County Contesting Boards (section 13 of the act of 1898, page 650, Kentucky Statutes) is governed by the same rules as to jurisdiction in contested elections as are provided in contests for Governor and Lieutenant-Governor. This has been the law in Kentucky for more than half a century. (See Revised Statutes, section 8, article 7, chapter 32; act 1851,

page 92, Acts 1850 and 1851. Under the statute, the powers of the board are set forth in plain and simple words (subdivision 8):

1st. To settle a tie vote by lot.

2d. To investigate whether the person elected was qualified to receive the office at the time of the election.

3d. Whether another than the person returned received the highest number of legal votes given.

These *alone* are the powers conferred. Neither the board, nor the two houses had any right to take into consideration votes which were not actually cast. They had no authority to declare the election void by reason of thin ballots or the use of military force; or for such reason to disfranchise all the voters in the localities complained of in order to declare that in the remaining portions of the State contestants received the highest number of legal votes given, and were, therefore, entitled to the offices. But upon these grounds, and no other, for the others amounted to nothing and were totally unsustained, knowing that they had no right to give any such reason for their judgment, and that they had no jurisdiction, they did not undertake to explain how they arrived at their conclusion.

No data is given upon which it was made. Indeed no reasonable data could have been given. Hence the board concluded it was best to give no reason, but to decide flatly and defiantly that the contestants had received the highest number of votes and trust to the approval of a packed tribunal to endorse their work.

Even had the objection to thin ballots and military interference been sustained, the only result would have been to render the election void and the Circuit Court, and not the Board of Contest, would have had jurisdiction to so declare.

In order that the powers of the board may be understood, as viewed by the Kentucky Court, attention is called to the decision in Leeman v. Hinton, 1 Duvall, 38. That opinion stands as the proudest monument to the learning, sagacity and impartiality of Justice Bullitt, who, though an intense sympathizer with those who were in rebellion against the govern-

ment, was able to rise above all partisan feeling, and give fair and legitimate construction to the laws of his State.

The Board of Contest in the Leeman case adjudged that he was not entitled to the office because, the election was held in each precinct under the supervision of military officers and a majority of the voters intimidated and overawed by such military authorities, and hence that said office was vacant. Thereupon the county court declared the office vacant and appointed Hinton, who qualified and entered upon the duties, but was forcibly ejected by the military, and the office taken possession of by Leeman. Hinton then instituted a common law action against Leeman as a usurper. The court below decided in favor of Hinton and Leeman appealed, and upon that appeal the judgment below was reversed.

In that opinion (page 40) the court said:

> "But the authority to decide as to the freedom and equality of elections has not been conferred by the Legislature upon the board for trying contested elections, but forms a part of the general jurisdiction of the Circuit Courts."

Following this is a quotation from the statute, and the court continues:

> "The board for trying contested elections has no authority except, first, to determine whether or not the votes given have been correctly summed up; secondly, to decide as to the legality of the votes given; thirdly, to decide by lot who is entitled to the office when there is a tie between the candidates receiving the highest number of legal votes given; and, fourthly, to decide whether or not the candidate receiving the highest number of legal votes given is qualified to receive the office, and if he is not, to order a new election."

At the conclusion of the opinion in Leeman case the court says:

> "As Hinton has not alleged that the election was con-

> trolled by military force, and as he has not shown that he is entitled to the office even if the election was illegal and void, we need not express an opinion," etc.

Counsel for defendants in error claim that this portion of the opinion is in conflict with the other portions quoted. This is a mere idle contention. The court said in the opinion that the Circuit Court had jurisdiction of questions involving the freedom of elections. The proceeding in that case was not a contest, but a petition in the nature of *quo warranto*, but the petition was defective in failing to make the allegations stated. Therefore, a failure of the court to pass upon questions not raised by the pleadings in the action by no means conflicts with the opinion holding that the Board of Contest had no jurisdiction to decide as to the equality or freedom of elections, and had no powers except these specially conferred by statute.

Again, in Newcum v. Kirtly, 13 B. Mon., 522-3, the court below held that the powers conferred on the board were the same as declared to have been conferred in the Leeman opinion, that no other power could be exercised, and that consequently the action of the board in counting votes not polled, although it should appear that the polls had closed too soon, and the voters were, on that account, prevented from voting, was unauthorized. Said the court in that case:

> "The necessary and certain import of the provision is that the contestant shall not be adjudged to be entitled to the office unless the board find that he has received the highest number of legal votes given."

In the Commonwealth v. Jones, 10 Bush, 743, the same statute is quoted and the court, at pages 749-751-752, holds, that the board did not possess power to declare the election of Jones void, but was confined strictly to the powers enumerated in the statute.

But it is said that this court, in Wilson v. Hines, 99 Ky., 221, overruled the Leeman and Jones cases. An inspection of the Hines opinion will show the contrary. It will be observed that the contest in that case grew out of a local option election.

In such a case the title of the candidate was not in issue, and hence the abridgement of the rights, privileges and immunities of the citizen were not involved. The only question was whether the election was authorized, and whether or not a majority had voted in favor of the law. The law governing such contests, will be found in section 2566, Kentucky Statutes, and was adopted August 6, 1892, page 219, Acts 1891-2-3. In such contests, appeals may be taken from the decision of the board to the Circuit Court and the Court of Appeals. When the Leeman and Newcum cases were decided there was no appeal allowed from the decision of the County Board of Contest.

Such is not now the case, an appeal having been subsequently allowed by statute. But no appeal is allowed in the contest of Governor and Lieutenant-Governor. Hence the full force of the Leeman and Newcum opinions apply to the present case. The fact that the rights and immunities of the citizen were not involved in the Hines case, and that the only question was regarding a local option election, doubtless influenced the court in the Hines decision. Besides, the Wilson and Hines case was not decided by the whole court, but only one division of it. (See Volume 1, page 161.)

It will be seen that in the case of Wilson v. Hines, supra, this court, while holding that a contest board might pass upon any matter or thing constituting a lawful ground of contest, unless restricted by the statute which prescribes their authority, adds:

> "But in every case they are to be governed by the rules of evidence as well as by the law regulating their proceedings, *and their action is subject to review and correction on appeal, which the statute allows.*"

It was not the intention of Wilson v. Hines to overrule the Newcum, Leeman and Jones cases. In proof of this the Court of Appeals, in Hocker v. Pendleton, 100 Ky., ~~421~~ 726 (after the Wilson case), directly recognizes and follows the Leeman case, which is cited in that case, by counsel for appellees, by holding that the Circuit Courts have jurisdiction to determine the freedom or equality of elections.

Nor can it be successfully contended that the present opinion is the law of the case because it is a decision of the highest State court on a State statute. Where the rights, immunities and privileges of a citizen have been abridged in violation of the supreme law of the land the decision of no State court, however exalted, can confer jurisdiction upon the board which has robbed the citizen, by attempting to clothe it with a jurisdiction it does not possess, and that too, in the very teeth of a contrary doctrine recognized by the same court for more than half a century.

III. NO ELECTION IF NOT FREE AND EQUAL.

As stated, the judgment returned by the Board of Contest, and the resolution approving same, is based upon thin ballots and military interference. If the thinness of the ballot or military interference affected the election, as contended, it would have destroyed the freedom and equality of the election, and the Circuit Court was the proper and only forum in which to have that fact declared, as held in Leeman v. Hinton, supra, and Hocker v. Pendleton, 100 Ky., 726.

The number of votes given in the counties named in the notices of contestants as having voted thin ballots and in Jefferson, where military interference is relied upon, is nearly one hundred and fifty thousand (Volume 2 Record, page 176), greatly more than one-third of the votes cast in the State. As to the number of these counties excluded we do not know for the judgment does not specify. But conceding that none were thrown out except those attacked by the proof, viz., Jefferson, Knox, Martin, Magoffin, Pike and Johnson, there were 19,318 Democratic and 26,226 Republican, in all, 45,554 voters disfranchised (Record, Volume 2, page 176), nearly one-eighth of the entire vote cast.

The State Constitution, section 70, declares that the Governor shall "be elected for the term of four years *by the qualified voters of the State.*" And yet we have in this case the anomaly presented of certainly not less than 45,000, and it may be as many as 150,000, voters disfranchised, in counties

paying more than one-fourth of the revenues of the State, notwithstanding which it is contended that a Governor has been elected. If the contention of defendants in error be true, and voters have thus been disfranchised, the Legislature had no right to declare any one elected, and the only remedy was, through the courts, to declare the election not to have been free and equal, and order another election. In such case there would have been no vacancy, for the Governor in office would have held over under the Constitution until his successor was qualified.

Granting, for the sake of argument, that the ballots were so thin as to enable persons to see how they were voted, it was no fault of the voter. The State furnished the ballots; the voter could not use any other. They were compelled to use them or decline to vote. Although Mr. Cooley says, star page 605 (Cooley's Constitutional Limitations), "that while such ballots may not render an election void, they are exceedingly reprehensible and ought to be discountenanced by all good citizens;" he continues, at star page 607, by saying that "the cardinal rule is to give effect to the intention of the voter whenever it is not left in uncertainty;" and at star page 616, says, "that one entitled to vote shall not be deprived of the privilege *by the action of the authorities* is a fundamental principle."

Granting further, for argument's sake, that there was such military interference in Jefferson county as prevented persons from voting who would have otherwise voted, such interference would not justify the disfranchisement of those who did vote, none of whom were responsible for such interference. Under such circumstances the remedy was to have another election ordered, and thus enable the "*qualified voters of the State*" to elect a Governor and Lieutenant-Governor, instead of deciding that a portion of the voters of the State could elect such officers.

It is true that in Nall v. Tinsley, 21 Ky. Law Reporter, 1172, the court below held, that "ballots should be printed on white paper sufficiently thick that the printing can not be distinguished from the back and if ballots are used at an election

which do not substantially comply with the law the election is not conducted as required by law, and is invalid."

An examination of that case will show that the only question in issue was whether the ballots complained of were proper ballots, and the court decided that they were. The portion of the opinion quoted was mere *dictum*, was foreign to the issue, and was rebuked by three judges of the seven sitting. But granting that the principal is correct, the decision only adds force to our contention, that the use of ballots proven to have been too thin could at most only render the election void, and that under such circumstances no candidate could be declared elected.

The State Constitution declares, section 6 (Bill of Rights):

"All elections shall be free and equal."

How can an election be free and equal when not less than one-eighth of the voters of a State, and possibly as many as nearly one-half, are disfranchised? If the doctrine in effect asserted by the Contest Board, and tacitly endorsed by the court below, be true, that one-eighth or nearly one-half of the voters of a State may be disfranchised, and that notwithstanding this an election can be declared to have been holden and candidates elected, there is no freedom or equality of elections in Kentucky, and there is no reason why a candidate may not be declared elected when he receives a majority in less than one-half the counties of the State, although the voters in the remainder of the State, whose votes, if counted, would change the result, have been disfranchised. Such a decision would be an unspeakable outrage.

Says Mr. Cooley, star page 616, supra:

"And although the failure of one election precinct to hold an election, or to make a return of the votes cast, might not render the whole election a nullity, where the electors of that precinct were at liberty to vote had they so chosen, or where, having voted but failed to make return, *it is not made to appear that the votes not returned would have changed the result*, yet if any action was re-

quired of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportunity to participate, and no mode was open to the electors by which the officers might be compelled to act, *it would seem that such neglect, constituting as it would the disfranchisement of the excluded electors pro hac vice, must, on general principles, render the whole election nugatory, for that can not be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded.*"

Again, star page 621, Mr. Cooley says:

"If, however, the inspectors of election shall exclude legal voters, not because of honest error in judgment, but willfully and corruptly, and to an extent that affects the result, or if by riots or otherwise legal voters are intimidated and prevented from voting, or for any other reasons the electors have not had opportunity for the expression of their sentiments through the ballot box, the election should be set aside altogether as having failed in the purpose for which it was called. Errors of judgment are inevitable, but fraud, intimidation and violence the law can and should protect against."

In Pendleton v. Hocker, 100 Ky., 726, the court below held that where an election was attempted to be held on the question of the sale of spirituous liquors, and out of a voting population of 175 there were 60 who were prevented from voting because of insufficiency of ballots furnished by the clerk, the election was not free and equal within the meaning of section 6 of the Constitution. If that election was invalid, surely the election in the State was invalid, when one hundred and fifty thousand voters (much more than one-third of the total vote) were possibly disfranchised by the decision of the board. We assume, therefore, that the board had no right under the circumstances, even though it was satisfied of the grounds stated, to declare that any one had been elected. Nor is it necessary, as

indicated by the judge of the Circuit Court, that either party should rely upon the fact that no election was held. We contend that appellants were elected by the highest number of legal votes cast, but if from the standpoint of appellees there was no election, and the Legislature so believed, then the only remedy was to order a new election, and the action of the Legislature declaring contestants elected is void.

The law is particular in seeing that the candidate who received the highest number of votes should receive the office; and even though he should die pending the election, or should be ineligible, his opponent can not have the office. (Howes v. Perry, 92 Ky., 260; Cooley's Const. Lim., star page 620.)

It is constantly to be borne in mind that the point of inquiry—

> "Is the will of the electors as manifested by their ballots, and to this should all the evidence be directed and none that does not bear upon it should be admissible." (Star page 625, supra.)

The Supreme Court of Illinois, in People v. Saloman, 46 Ills., 415, decided:

> "Where there is a lawful election in a part only of the territory over which the election should be held, the election is void in its entirety."

An examination of the record, however, will show how utterly groundless are the charges of thin ballots and military interference.

IV. THIN BALLOTS AND MILITARY INTERFERENCE MERE PRETENSES.

As to the ballots the evidence was conflicting, and at most did not establish the fact that the manner of voting could not be determined when theballots were properly folded. In all the evidence NOT ONE witness stated that any voter was confused by the ballots, failed to vote, or changed his vote on that ac-

count, or that a single objection was made or vote challenged in any part of the territory named. Besides, it affirmatively appeared, without contradiction, that the result in November, 1899, between the leading parties was in proportion to that in preceding elections. It does not appear that contestants lost one vote, or that contestees received one vote improperly on account of the character of the ballots. This not only appears in the proof, but in the pleadings to which demurrers, admitting their truth, were sustained. (See answer and amended answer, 2 Volume Record, pages 10 and 58.) The complaint was not made in good faith, but was the mere pretense, which it was thought might give color at least to the contemplated robbery. Of the 116,000 ballots complained of not more than one dozen were produced in evidence, all the others having been destroyed. This fact is shown by the proof, and admitted by the pleadings. Under section 1482, Kentucky Statutes, and the decision of the court below in Struss v. Johnson, 100 Ky., 319, no ballot can be excluded from the count unless the same is sealed up and returned to the clerk of the county court with the returns of the election, with a true statement as to whether it has or not been counted; and if counted, what part and for whom. Indeed the court below has gone so far as to decide that, although contested ballots are returned to the proper officer sealed properly, they can not be counted unless accompanied with a statement that they had not been counted. (Anderson v. Likens, 20 Ky. Law Reporter, 1001.)

As to military interference, both proof and admitted pleadings show, that the excitement in Louisville, Jefferson county, was intense, so much so that a large number of extra policemen were sworn in and the Mayor issued a proclamation, in which, strange as it may appear, he prohibited crowds from assembling at the polls. Those opposed to contestants openly stated that the policemen and firemen were to be used to control the election in favor of contestants, threats were made by many that they would go to the polls armed, and on the afternoon of the day before the election more than seventy Republican officers of election were summarily removed, and their places filled with men who were in sympathy with contestants. The city was in a wild

state of excitement. A number of affidavits made by reputable citizens were filed with the Governor, who was in the city, stating that riot and bloodshed were imminent; that the local authorities were incapable of protecting the public peace, and could not be trusted to take charge of the State Guard, and requesting that he should call the guard, all of whom lived in Louisville, into their armory (as had been frequently done before in that city on election days), and take personal charge. This the Governor did, as the chief peace officer of the Commonwealth, making public statement that the purpose was to keep the peace and protect all the citizens. The soldiers, some one hundred and fifty, were stationed in the armory, which was not in sight of any polling place in the city, and not one of them was present during the election at any voting place, or was in sight of any polling place, or in any way interrupted the election or voters. The polls closed at 4 o'clock, p. m. After that hour Judge Sterling B. Toney, *who voted for contestants*, informed the Governor, in writing, that he had issued an order commanding that certain inspectors should be admitted to the count, that his order was being contemptuously disobeyed, and he was unable to enforce it. Thereupon, the Governor ordered out the soldiers to enforce the order. They did not leave the armory until after 7 o'clock, p. m., and found the polls closed and count completed, except in three voting places, and in no one of these did they interfere in any way. This is the sum total of the proof and admitted pleadings. (See Record, Volume 1, page 59, and evidence of D. W. Gray, C. C. Mengel, Judge J. W. Barr, Donald McDonald, J. T. O'Neal, J. B. Pirtle, W. O. Bradley, Milton Bronner, Andrew Cowan, Morris Gifford, G. W. Halsey, John R. Kelday, Thos. J. Landrum, Morris Lawson, Chas. F. Huhlein and Sterling B. Toney.)

The claim that these soldiers had been equipped for the purpose of taking part in the election was thoroughly exposed by the testimony. It was shown, that the Governor had made diligent efforts, after the old State Guard had gone into the United States service in the war with Spain, to organize a State Guard throughout the State; that after repeated delays

the members in Louisville had organized in August, and that the reason no equipments were sent to them until a short while before the election was because, they had been unable to obtain an armory, and that the gatling guns, about which so much has been said, belonged to the old State Guard at Louisville and were returned to their successors.

There was proof in the record that the Democratic registered vote failed to vote for contestants by about nine thousand, and hence it was assumed that these men had been prevented by military interference from voting, but in all the array of witnesses presented by contestants there was no proof that a single voter in Louisville had failed to vote on account of such interference. Contestees showed, by a large number of leading Democratic citizens, that there was great disaffection in that party on account of which many voted the Republican ticket, and about 2,000 voted for the Independent Democratic ticket. Brandeis, Speed and others showed, that upon a comparison of the votes cast by name and party affiliation with the registered vote, that the Republican was greater than the Democratic loss. Besides, it was shown that the most glaring frauds were committed by the Democratic organization, men prevented by all sorts of devices from voting, and Republican officers excluded from the booths when the count was made.

In short, there was nothing but pretense in the complaint of military interference, it being but another ground assumed to cloak the great wrong that was contemplated, and which, to the eternal discredit of the State, has been consummated.

That soldiers should not be employed to intimidate voters or influence elections no man will controvert, but the people are as much entitled to protection from riot and bloodshed on that as on any other day is equally true: that soldiers may and should be employed on such occasions, where it is shown the ordinary peace force is insufficient to prevent threatened disorders is recognized by Mr. Cooley. (See star page 615, supra.)

It can not be successfully contended that the court in investigating these questions can not look into the evidence and

pleadings before the Legislature. The action in such a state of case does not impeach or contradict any record or journal however sacred they may be held. If the court has jurisdiction to try the case, it may rightfully, and with care, inspect all the evidence that was heard in the tribunal complained of.

V. NOTICE OF CONTEST PRECLUDES JURISDICTION.

It is contended that the notice of contest did not confer jurisdiction on the two houses to try the contest. If this be true, no question as to the inspection of legislative action in contradiction of its journals, even if the correct doctrine, can have any application.

The jurisdiction to try the contest depends upon the notice. Section 1535, Kentucky Statutes, provides:

> "*No application to contest the election of an officer shall be heard,* unless notice thereof in writing, signed by the party contesting, is given. *The notice shall state the grounds of contest, and none other shall afterwards be heard* as coming from such party."

It was not alleged in the notices that there was a tie vote, neither was it charged that either of the contestees were not qualified. There is but one other ground of jurisdiction mentioned in the statute, and that is, that the contestees received the highest number of votes given. Besides, the Constitution says that "the person having the highest number of votes shall be Governor." In order to confer authority upon the two houses to try the contest the allegation should have been made in the notices either that each of the contestants received the highest number of votes or that the highest number of legal votes had been given each of them.

The notices in the main claim that the election was void, which, if true, would have taken the case out of the control of the legislature.

It is stated that the contestees were elected, but this is a mere conclusion, and it is nowhere intimated that they re-

ceived the highest number of votes. The notice must be specific "and point out the precise grounds of contest." (Rainey v. Ratcliffe, 81 Ky., 468; Grinstead v. Scott, 82 Ky., 88.) The names of the illegal voters should have been given and the reason why they were illegal. (Lunsford v. Culton, 15 Ky. Law Rep., 504.)

This view of the case is very clearly set forth in the terse and able dissenting opinion of Justice DuRelle in the court below.

The Legislature is a court of special jurisdiction to try these cases. It does not act as a Legislature, but as a contest board in its entirety. The statute regulating the proceeding speaks of the "judgment" of the board, etc. It has no authority to try any other State contest, indeed no other except as to its own members. Such tribunals have no jurisdiction in the absence of the statement of the jurisdictional fact in the pleading, which in this case is the notice. (Works on Courts and Jurisdiction, 31; Well's Jurisdiction, section 4.)

The demurrer filed to the notice and each paragraph thereof should have been sustained instead of being overruled. (Record, Volume 1, page 30.)

VI. JURISDICTION MUST BE PROPERLY EXERCISED.

But even though the Legislature possessed jurisdiction, both under the charges contained in the notice and the provisions of the statute, that jurisdiction must have been properly exercised and not used as an instrument of wrong or oppression. (Yick Wo v. Hopkins, 118 U. S., 373.)

Being authorized to act only "according to such regulations as may be prescribed by law," it could not lawfully disregard such regulations, but must have acted at least substantially within them, and the Kentucky Court of Appeals has directly recognized this principle in Newcum v. Kirtly, 13 B. Mon.; Leeman v. Hinton, 1 Duvall, and Commonwealth v. Jones, 10 Bush.

VII. MEMBERS CONTEST BOARD FRAUDULENTLY DRAWN.

It is charged and admitted by demurrer, that the members of the board were drawn by trick and fraud, so that only three Republicans were *placed upon the two boards of twenty-two members.* The court below says that the presumption must be indulged that the Legislature acted fairly, going on the principle that every officer must be presumed to have done his duty. But this presumption may not be indulged where the officer is charged with fraud. Besides, it must not be forgotten this is a tribunal of limited jurisdiction, for the Constitution requires that it shall determine the contest in accordance with regulations established by law.

Why create a tribunal of limited jurisdiction if it has the power to say absolutely, or if it must be presumed that it has acted within the limitations? The sovereigns, in making the Constitution, well knew what the result would be if a partisan Legislature were given unlimited and undefined power to try such contests. Hence, they were unwilling and declined to clothe them with such authority. They were careful to provide that the determination should be had under regulations established by law. And this is the strongest evidence that they intended that the judiciary should have the power to investigate whether or not the powers conferred had been violated.

> "The rule of law upon the subject appears to be that, *except where the Constitution has imposed limits upon the legislative power* it must be considered as practically absolute." (Cooley's Const. Lim., star page 168.)

Besides, the admission by the demurrer that the members were fraudulently drawn by trick and device overcomes any presumption that might have otherwise been indulged.

Coupled with this is the charge, made by affidavits before the board and the two houses, that five of the board were partial to contestants and had advised that the contests should be made; that two others were directly interested in that their

seats were contested on the same grounds as those set forth in the counter notice of contests in these actions; that another member was directly interested, having wagered money on the success of the contestants, which wager has been held up to await the result of the contest, and that two others had expressed the opinion that contestants should have the office even though they had not received the majority of the votes given, notwithstanding all which they were permitted to serve. We ask, is it due process of law to try this issue before a board fraudulently drawn, and which was incompetent to act by reason of partiality and interest? Due process of law certainly implies a fair tribunal, for, pray, what process of law can there be in forcing one to be tried before a tribunal whose opinion, by reason of interest and partiality, is made up before the trial commences? The makers of the State Constitution, and the statutes under which the contest was tried, never intended such a travesty on justice, and the statute which was the limit of legislative jurisdiction especially provided against such action.

By such action the Legislature not only refused to be bound by the chart of its authority, but exercised absolute, arbitrary power by reason of which its determination is void.

Says Mr. Cooley, star page 410, supra:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man judge in his own case IS VOID IN ITSELF; for *jura naturæ sunt immutabalia* and they are *legis legum*.' "

Continuing, at star page 411, the learned author says:

> "This maxim applies in *all* cases, where judicial functions are to be *exercised*, and excludes all who are interested, however remotely, from taking part in their exercise.

It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question he has no authority to determine the cause. * * *

"Accordingly, when the Lord Chancellor was a shareholder in a company in whose favor the Vice-Chancellor rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing:

"It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was, on that account, a decree not according to law, and it was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

VIII. A REASONABLE HEARING DENIED AND EVIDENCE IGNORED.

By failing to give the contestees reasonable time in which to prepare their case, introduce their testimony and argue the cause, due process of law was denied. In every cause the party must be summoned or the judgment is void. A summons is worthless if one be not allowed reasonable time in which to answer and prepare his case. The existence of one requisite is as necessary as the other to give validity to the judgment. This court held in the case of Hovey v. Elliott, 167 U S., 444-5, opinion by Mr. Justice White.

"It being, therefore, clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed *and to ignore the proof taken in its support*, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may, therefore, be collaterally attacked. It can not be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of Hovey v. McDonald, upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defense? As said by this court in Adams against Postal Telegraph Cable Co., 155 U. S., 689 and 698, the substance and not the shadow determines the validity of the exercise of the power."

In the same opinion (167 U. S., 418) the court approvingly cites the case of Galpin v. Page, 18 Wall., 350, wherein it is held:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear *and has been afforded an opportunity to be heard*. Judgment without such citation *and opportunity* wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld when justice is justly administered."

Said this court, speaking through Mr. Justice Field, in Windsor v. McVeigh, 93 U. S., 277-8:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal."

Before the two houses could have properly determined the contest they must have heard the evidence. No court can divest one of a right or privilege where proof is required without hearing the evidence. Judgment can not be rendered without process and a hearing as we have seen. A hearing includes the evidence. If A sue B for the recovery of personal property, alleging ownership and that he is entitled to the possession, and B traverse the allegation, and no evidence be introtroduced, and it could be certainly demonstrated that the evidence was not read, and that the evidence demonstrated, beyond question, the defendants' proper holding, no court could render a valid judgment in favor of A. This would be nothing more than the employment of brute force, and could not be upheld. Evidence in such a case is as necessary to authorize judicial action as process. To deny one the right to introduce evidence would be as arbitrary as to refuse permission to file a pleading when the party was not in default; and to give insufficient time to hear evidence, or to refuse to read it after it is given, would be equally reprehensible.

The opinion of the majority of the court below, however, here comes to the rescue of the Legislature with a presumption that it must have read the evidence. But how can this be possible, where the report of the board was filed on the 31st of January, and action taken by the Legislature that day, if the journals are to be believed. (1 Volume Record, pages 81-82-83.) And the evidence (now before this court) covers nearly NINE HUN-

DRED PRINTED PAGES. It is manifest that it was a physical impossibility for the evidence to have been read.

So that we find this body disregarding the statute under which it alone can act in the selection of the board, in refusing to grant sufficient time to the parties to prepare their case, introduce their testimony or make argument (for the board was the mere agent of the Legislature), and finally attempting to determine the rights and privileges of citizens without hearing the evidence upon which alone the contestants claimed the right to the offices.

IX. BOTH HOUSES DID NOT DETERMINE THE CONTEST.

Again, as a part of the due process of law, BOTH houses of the Legislature must have determined the contest in accordance with the rule laid down in the statute. The Constitution and statutes require that BOTH houses shall determine the contest. (Sec. 90.) Now what is meant by BOTH houses? Does it mean that a majority present shall control or does it mean that a majority of all the members elected to both houses shall be necessary? And did the Constitution mean that a majority of all the members in joint assembly could determine the cases? Clearly the intention and meaning of the section was that a majority of the members elected to each house should be necessary, and if either house failed by a vote of such majority to sustain the contest that it must fall. Otherwise, twenty-six votes out of one hundred in the House and eleven votes out of thirty-eight in the Senate, might control, upon the theory that a mere quorum was present. Or in case of joint assembly with only seventy members present, thirty-six out of that number could control. Those who favored the contest entertained the same views as to the constitutional and statutory requirements as we claim, and for the purpose of evading the Constitution enacted, through the Committee on Rules, of which Mr. Goebel was Chairman in the Senate, what is known as "Rule 11" (Volume 1, page 26, Record). So that, although the Constitution and statute

of the State required that the two houses of the General Assembly should act separately in determining contests concerning Governor and Lieutenant-Governor, said rule required that said houses should act in joint session. Not only so, although the Constitution required that the Lieutenant-Governor should by virtue of his office preside over the Senate, the rule, in defiance of the Constitution, required that in the joint session the Speaker of the House should preside, and gave to him alone the right to call such meetings. But to make the rule even more unconstitutional and odious, if possible, no provision was made for the return of the evidence or the reading of the same, but such reading of the evidence was rendered absolutely impossible by requiring that when the report was made it should be *immediatety* taken up for consideration and discussion for a time not exceeding six hours, and at the conclusion of that time, or sooner, if the discussion should have ceased, the joint meeting should vote to a conclusion of the business before it without intervening motion or business. This rule was adopted after this contest was inaugurated because it was feared that a majority of each House would not sustain the contest, with the view of furnishing an unfair, illegal and unjust method of stifling the truth and making easy the larceny contemplated. In point of fact the contests were taken up immediately on the making of the report and decided.

And yet the court below, in the face of a record made by the Houses that assumed to try these cases, and the physical impossibility for them to have heard the testimony, held that it must be presumed that they read the evidence.

Now in point of fact the pretended journals of the Senate show that on the 31st of January, and the 2d of February, only nineteen Senators voted in favor of the resolution adopting the report of the board. Not only the names of the persons are given, but also the number. On the 31st of January it is not claimed that the houses voted in separate, but in joint session; and the journal shows that only *nineteen* Senators voted for the resolution. (Record, Volume 1, pages 81 to 85, both inclusive.)

On the 2d of February, knowing that the proceeding of the 31st of January was void, each house voted separately on the resolution, the Senate again casting only nineteen votes for the resolution. (Record, Volume 1, pages 88 to 91, inclusive.) In the joint session of February 2, however, it appears that only *eighteen* members of the Senate voted for the resolution. (Record, Volume 1, pages 94-95.)

It is true that the journals recite when the nineteen Senators voted that a majority of the Senate voted for the resolution, and with equal ease and propriety recited when the eighteen Senators voted that a majority of the Senate had voted for the resolution.

In other words, it mattered not how many or how few Senators voted the number was a majority of the Senate. It is evident when the vote is shown specifically by name and number, in the journals, and the statement made that such number was a majority, that the full effect of the contention is that, in the opinion of the Senate, that number constituted a majority of the members of the Senate. The plaintiff, Beckham, states in his petition (Record, Volume 1, page 4) that nineteen members of the Senate voted for the resolution, entertaining doubtless the same opinion as the Senate, that nineteen members was a majority of the members of the Senate, Mr. Goebel being unable to attend. Hence when we assert it is clear that not more than nineteen members of the Senate voted and it is no contradiction of the journal, but in thorough accord with it. It will be seen that defendants in error undertake to explain that eighteen Senators constituted a majority, from the fact that T. M. Hill had never qualified, but this is denied, and no proof was had on the subject. It was known to no one more certainly than to these Representatives and Senators that the resolution was not properly adopted; and hence, on the 20th of February, a resolution was introduced and adopted in joint and separate session *re-adopting, re-enacting, re-affirming and ratifying* all the proceedings prior to that time.

It is contended that the action of January 31st is void because it was by joint session alone and because a majority of

the members of the Senate did not vote for the same; that the action of the Senate separately, on February 2d, was void because a majority of the Senate did not vote for the resolution, and that the action in joint session on that day was void because the joint session could not legally act, and even if it could, that the vote of eighteen was not a majority of the Senate. The pleadings show that there were thirty-eight members of the Senate elected, and as Mr. Goebel did not die until the 3d of February, there was that number of members alive on all the occasions mentioned. However, the death of Mr. Goebel could not affect the matter in any way, because when the Constitution speaks of both Houses it speaks of them as being constituted of the members elected, and a majority of either House means a majority of those elected. If we are right in our position the contest was not properly determined, and without such determination plaintiffs in error can not be deprived of their rights and privileges.

Doubtless when the framers of the Constitution created section 90 they had in mind the necessity by separate action of the two Houses to use one of them as a check upon the wrongful action of the other. Speaking of the power of the executive, a learned author says:

> "This negative power over the branches of the legislative department is a conservative power, and was intended in degree to check the Legislature in the well-known disposition of that body, as demonstrated in history and experience, from making encroachments on the other departments and gradually assuming to itself the exercise of executive and judicial power. (Story on Constitution, section 520.) The apprehension of this disposition on the part of legislative bodies was one of the main reasons for dividing the legislative body into two departments, of Senate and House of Representatives, in the belief that the one might act in degree as a restraint upon the other. Not only different individuals, but different bodies of individuals, will differ as to the extent of their own powers and as to the nature and extent of constitutional prohibitions; and generally the most popular branch,

are more easily moved by strong passions and excitement, under the temporary ascendency of some impetuous or popular leader, to act with less coolness and deliberation, to make encroachments upon the fundamental law, than the higher branch chosen from a more extended constituency.

"'One great object,' says Chancellor Kent, 'of the separation of the Legislature into two houses acting separately, and with co-ordinate powers, is to destroy the evil effects of sudden and strong excitement and of precipitate measures springing from passion, caprice, prejudice, personal influence and party intrigue, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies.' No portion of the political history of mankind is more full of instructive lessons on this subject, or contains more striking proof of faction, instability and misery of States under the single dominion of an unchecked assembly than that of the Italian Republics of the middle ages, which arose in great numbers, and with dazzling but transient splendor in the interval between the fall of the Western and Eastern Empire of the Romans. They were all alike, ill-constituted, with a single unbalanced assembly. They were alike miserable, and all ended in similar disgrace." (Potter's Dwarris on Statutes and Constitutions, pages 338-339.)

X. VOID ACT CAN NOT BE RATIFIED.

If it be true that the vote in the Senate was insufficient, under the Constitution and laws, the effort of the two Houses on the 20th of February to make it legal was of no effect. Even though both Houses at that time had the right to take up the contest *de novo* and determine it by a constitutional vote, they could not ratify or adopt such action so as to make it legal or binding.

In the first place, we call attention to the fact that on the 2d of February, after the resolution adopting the report of the board had been attempted to be adopted by nineteen Senators, Senator Utley moved to reconsider the vote by which the Sen-

ate had adopted the same, and then moved to lay the motion to reconsider on the table, which last motion was adopted. The adoption of that motion finally disposed of the matter, and placed the decision of the contest beyond the power of the body. For this reason the action of February 20th was unauthorized and void.

Again, on the 20th of February, Senator Goebel had been dead for more than two weeks, and action at that time could not render valid or binding the oath which was administered to him before his death.

But on general principles, that which is void can not be made legal any more that that which is dead can be revivified. If the original action was void, it was worthless and of no effect. The paper upon which the proceeding was written was only so much blank paper. The pretended act had no existence, and that which was not could not be vitalized.

> "An act absolutely void at the time it was done can not be ratified." (Mechem on Public Officers, section 531.)
>
> "A void act of the Legislature can not be ratified or made obligatory." (Auditor v Cochran, 7 Bush, 1.)
>
> "Lapse of time may cure irregularities in judicial proceedings, but can not cure that which is void." (Schaefer v. Gates, 2 B. M., 457.)

XI. CONTEST NOT IN FACT DETERMINED.

We contend, in the next place, that due process of law was denied the paintiffs in error unless the decision of the Legislature was in fact made. It will be observed that the Legislature at most adopted the report of the board. The duty of the board was to pursue the forms of law obtaining in trials before a court, take the testimony and report to the General Assembly.

> "Such report shall not be final nor conclusive. Such decision shall be reported to the two Houses of the General Assembly, for the future action of the General Assem-

bly. And the General Assembly shall *then* determine such contest." (Subdivision 9, section 8, page 647, Kentucky Statutes, edition of 1900.)

The report gives no data. It is vague and general. It furnished no reason for the conclusions stated. The two houses were left in complete ignorance of the grounds upon which it was based. The testimony did not accompany it. Now how can it be said that the General Assembly "determined" the contest when there was nothing before it on which such determination could be had. It had no right under the law to make the judgment of the board the foundation of its determination. The word determine implies examination, investigation and the rendition of an opinion. The General Assembly, therefore, not having legally determined the contest, their pretended action could and did not vest defendants in error with any title to their offices upon which recovery could be had, and, therefore, the judgment below was unauthorized, and must be reversed.

XII. THE GOVERNOR'S PROCLAMATION OF ADJOURNMENT.

But it is contended that the Legislature had no right to act on the 31st of January or 2d of February because it had been adjourned by proclamation on the morning of the 31st until the 6th day of February. The fact that the court below has construed the State Constitution by no means precludes this court from construing it, when the contention is that plaintiffs in error have been deprived of rights, privileges, immunities and liberty guaranteed them by the supreme law of the land. As well might it be contended that this court is bound by the State courts' construction that a State statute does not impair the obligation of a contract. The court below, while manifesting tender solicitude for the legislative department and shrinking with almost prudish modesty from even criticising its action, although fraud and corruption is charged and admitted by demurrer, evinces no disinclination to decide that the executive

has improperly exercised a power claimed by him to have been conferred by the Constitution.

The question at issue being whether plaintiffs in error have been without due process of law deprived of their rights, privileges or liberty, and the jurisdiction of their tribunal which decided the case being primarily and essentially necessary to constitute such process, this court having assumed jurisdiction in the case, the decision of the court below on any essential point conflicting with the constitutional right is subject to review. If the court below, in giving an improper construction to the State Constitution, thereby attempted to validate the action of the tribunal that tried the contest, but for which construction its action would have been void, such construction is not binding on this court.

If Governor Taylor had the right to issue the proclamation of adjournment, and the Legislature saw fit to ignore it, all of its actions in this contest in violation of the proclamation are void, for plaintiffs in error have been thereby deprived of their rights, privileges, immunities and liberty without due process of law.

In order to arrive at a proper solution of this question, attention is called to both the old and new Constitutions of Kentucky.

> "The General Assembly shall convene on the first Monday in November after the adoption of this Constitution, and again on the first Monday in November, 1851, and on the same day of every second year thereafter, unless a different day be appointed by law; and their sessions shall be held at the seat of government." (Section 18, article 2, old Constitution.)
>
> "The first General Assembly, the members of which shall be elected under this Constitution, shall meet on the first Tuesday after the first Monday in January, 1894, and thereafter the General Assembly shall meet on the same day every second year, *and its sessions shall be held at the seat of government* except in case of war, insurrection or pestilence, when it may, by proclamation of the Governor,

assemble for the time being elsewhere." (Section 36, present Constitution.)

It will be observed that under the old Constitution, the General Assembly was required to meet on a certain day unless a different day should be set apart by law.

In the new Constitution the day is certainly fixed, and no other time can be substituted by the Legislature.

In the old Constitution it is required that the sessions shall be held at the seat of government, and no provision is made for its being held elsewhere.

In the new Constitution, after the words "and their sessions shall be held at the seat of government," the following significant language is added, "except in case of war, insurrection or pestilence, when it may, by *proclamation* of the Governor, ASSEMBLE elsewhere."

Under the old Constitution there was no provision made for the holding of the sessions of the Legislature other than at the seat of government, except when such session was called on extraordinary occasions. Now, what reason is there in the contention that although the Governor can, under the present Constitution, in a certain contingency, convene the Legislature on the day set apart by law for their meeting, elsewhere, that he has no right to convene them, upon the happening of the same contingency during their session, to some other place?

The right of the Governor to issue this proclamation is not confined to the *time of meeting*, nor is he confined in his right to convene it at that time alone: but the right to issue the proclamation applies to the *place of meeting*, irrespective of time. The exception applies to the holding of "its sessions at the seat of government" as well as to its meeting. The Legislature is not only required to meet on the same day every second year, but it is required to hold its sessions at the seat of government after it assembles. Both these requirements are absolute "except in case of war, insurrection or pestilence."

When this contingency arises the Governor by proclamation may assemble it, for the time being, elsewhere, whether the contingency arises before or after the meeting.

In other words, the Governor may convene the Legislature on the day of its meeting elsewhere; or he may, in case the contingency arises, after it has assembled at the seat of government, assemble it elsewhere.

As to convening the General Assembly on extraordinary occasions, the following is the language of the new Constitution:

> "He may on extraordinary occasions convene the General Assembly at the seat of government or at a different place, if that should have become dangerous from an enemy or from contagious diseases. In case of disagreement between the two houses with respect to the TIME of adjournment, he may adjourn them to such TIME as he shall think proper," etc., etc. "When he shall convene the General Assembly, it shall be by proclamation, stating the subjects to be considered, and no others shall be considered." (Section 80, present Constitution.)

Section 41 of the present Constitution, declares:

> "Neither house, during the session of the General Assembly, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting."

This is exactly the same as section 23, article 2 of the old Constitution.

This section clearly prohibits the Legislature from adjourning to *any other place*. The consent of both houses must be had to any adjournment for more than three days, but neither house, with or without the consent of the other, can adjourn to any other *place*.

The consent applies only to the *time* of adjournment. To give it the meaning contended for by opposing counsel, the words "without the consent of the other" should be transposed and appear at the conclusion of the section. Again, in case of any of the contingencies named, the General Assembly might reasonably be dispersed in a moment and desert the capital of the State without ad-

journing elsewhere. It could not be expected to re-assemble at the capital in order to adjourn to another place. It would have no authority, by any power of its own, to meet elsewhere, and hence, its session would be destroyed. In such a case it can not be doubted that the Governor could assemble it at some available place.

The present case demonstrates the wisdom of the construction contended for.

Paragraph 2 of the amended answer, page 59, vol. 1 of the record, charges:

> "As to the proclamation of defendant Taylor, as Governor, adjourning the Legislature from Frankfort to London, defendants further say, that at the time of said proclamation, the aforesaid William Goebel had just been shot; that the most intense excitement prevailed in the city of Frankfort; that threats of blowing up the public buildings and taking human life were being freely made; public peace was threatened and a general state of confusion, insurrection and danger to life and property existed in the city of Frankfort."

To this amended answer a demurrer of appellees was sustained. That demurrer admitted the truth of the facts charged. If under such a state of case the Governor had not adjourned the Legislature, to meet elsewhere, and it had met in the capitol building, it would have evidently been both unsafe and dangerous.

XIII. RULES DEFINING DUE PROCESS OF LAW.

In view of the many plain and palpable violations by the Legislature of the laws of the land, its exercise of unwarranted jurisdiction, its cruel use of arbitrary power, its contempt for the rights of the citizen and the representatives of the people chosen at the ballot box, how can it be contended for an instant that it has afforded the plaintiffs in error due or any process of law? Such conduct is strangely out of place when

contrasted with the rules that are applicable to the trial of cases.

Said the court in Wyndham v. The People, 13 N. Y., 434, approvingly quoted in Potter's Dwarris on Statutes and Constitutions, page 437:

> "To give this clause 'due process of law,' its true and proper value to the citizen, it must be made to mean that no person shall be deprived *by any form of* legislative or governmental action of either life, liberty or property, *except as the consequence of some judicial proceeding appropriately conducted.*"

Continuing, the court says (which is also approved), page 437:

> "The meaning of this provision, then, according to its best interpretation by judicial authority as well as history, is that no member of the State shall be disfranchised, *or deprived of any of his rights or privileges*, unless the matter shall be adjudged against him upon trial had according to the course of the common law; he is to be secured the benefit of those rules by which judicial trials are regulated and to place those rules beyond the reach of legislative subversion."

And in the case of C., B. & Q. R. R. v. Chicago, 166 U. S., 234, the court held:

> "It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendants having full opportunity to be heard, met the requirements of due process of law. (U. S. v. Cruikshank, 92 U. S., 542-554; Leeper v. Texas, 139 U. S., 462-468.) But a State may not, BY ANY OF ITS AGENCIES, disregard the prohibitions of the fourteenth

amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. *In determining what is due process of law regard must be had to substance, not to form.*"

In Yick Wo v. Hopkins, 118 U. S., 373, this court held, through Mr. Justice Matthews:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand, * * * it is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S., 259; Chy Lung v. Freeman, 92 U. S., 275; Ex parte Virginia, 100 U. S., 339; Neal v. Delaware, 103 U. S., 370, and Soon Hing v. Crowley, 113 U. S., 703."

This court held in Poindexter v. Greenhow, 114 U. S., 295, Mr. Justice Matthews delivering the opinion of the court:

"And it is no objection to the remedy, in such cases, that the statute upon application in the particular case sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

XIV. THE LEGISLATURE ABOVE JUDICIAL CONTROL.

The broad and unqualified announcement by the court below, that the action of the Legislature can not be reviewed by the judiciary because the power to act is conferred by the Constitution upon it as a separate department of government, is a doctrine both startling and monstrous. That the action of the legislative body within constitutional limitations may be final will not be controverted; but if, as in this case, it sees fit to violate the Constitution and statutes of the State, and the Constitution of the United States also, and without authority, acts in a given case upon the facts presented therein, because under another state of fact it has authority; if in acting it fails to grant to the party affected due process of law, the Constitution of the United States, which is the supreme law, may be invoked to prevent a robbery, and rebuke the tyrant. To hold otherwise would be to decide that the fourteenth article of amendment to the Constitution is but an empty sound, and republican government a failure.

The Legislature is but the servant of the people. It was created by the sovereign will, and there can be no supposable case where it may become the master. When the people concluded to constitute the Legislature a contest board to determine as to two State offices any contest that should be made, which power would have naturally fallen to the judicial department, they did not intend to vest it with arbitrary power, or to place it above all responsibility. It was not their intention to enable it to commit grand larceny. The power to deprive one of his rights, privileges, immunities, property, liberty or life without due process of law was not intended to be, was not and could not have been, conferred on any governmental department. While action within the law might be considered final in any department of government, action without the law, arbitrary and tyrannical action in disregard of rights secured—not only by the Federal Constitution, but by the rules of common honesty—can not be recognized as being either final or binding in any civilized government. The courts are constantly holding that laws passed by the Legislature are unconstitutional. If a

statute, which is in the direct scope of its powers as a law-maker may be destroyed by the decision of a court, why should not the action of its members, not as a Legislature, but as a contest tribunal, being judicial or quasi-judicial, be the proper subject of review? If a statute passed by it may be declared unconstitutional, why may not its action as a contest board be likewise so declared? Can it be said that the latter power is superior to the former?

The power conferred on the two Houses in the contests named was conferred subject to the same limitations that would have attached had it been conferred on the judicial department. Besides, it was not conferred as a legislative power. The two Houses were merely made a contest board in their entirety. The legislative department, whether it be clothed with general or special power, can not plunder the citizen or trample his rights in the dust with any more impunity than can the executive or judicial power commit such an outrage.

Said Mr. Chief Justice Marshall, for this court, in Cohens v. Virginia, 6, Wheat., 381-382:

> "The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution, and if there be any who deny its necessity, none can deny its authority. To this supreme government ample powers are confided, and if it were possible to doubt the great purpose for which they were so confided, the people of the United States have declared that they are given 'in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to themselves and their posterity.'
>
> "With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purpose. * * * The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department.

It is authorized to decide ALL CASES OF EVERY DESCRIPTION, ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES."

The people of Kentucky have clearly announced that it was not their intention to confer such an unbridled license upon the legislative department as would place its action above judicial inquiry, when the rights, privileges, life, liberty or property of the citizen is involved. In their Bill of Rights, section 26 of the Constitution, occurs this language:

"To guard against transgression of the high powers which we have delegated, WE DECLARE that everything in this Bill of Rights is excepted out of the general powers of government and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

In the same instrument it is declared:

"Section 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

"1st. The right of enjoying and defending their lives and liberties.

* * * * * * * * * *

"3d. The right of seeking and pursuing their safety and happiness.

"Section 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic, not even in the largest majority.

"Section 14. All courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delivery."

And in the face of this broad assurance of the largest liberty and the fullest protection of every right the highest court of Kentucky has held that the action of this legislative body is supreme, and that there is no power which may even criticise its action. When, however, the question is presented as to

action of the executive, another co-ordinate branch of the government, in the issuing of a proclamation, the court manifests no concern, but proceeds in a truly refreshing manner to condemn his action as unwarranted.

And yet in their opinion, in illustrating the independence of each department, they instance the executive by saying that they could not inquire whether the Governor had properly granted a pardon. Suppose the Governor's power "to pardon had been by the Constitution required to be executed in accordance with regulations established by law" and the Governor had exercised such power outside those regulations, what then would be the jurisdiction of the court? A reference to the power of pardon, which exists without limit, is an unfair illustration of the question in issue.

In declaring that the action of the Legislature is final, and not the subject of judicial investigation, because no appeal has been provided from the decision, the court below deliberately destroys the old landmarks established by its opinions for nearly half a century.

In Newcum v. Kirtly, 13 Ben Mon., 524 (which was decided by 1852), the Kentucky Court of Appeals, while holding that the decision of the Contest Board was final, nevertheless held that in so far as the decision went outside the statute (which was the same as now except no appeal was allowed, Acts 1850-1851, page 92), and undertook to pass upon votes not given, it was unauthorized. In other words, that the decision was final as long as the board confined itself to the statute.

Much ado has been made concerning the declaration in the Newcum case, that the purpose of creating such boards was to prevent the ordinary tribunals of justice from being harrassed, etc. But, notwithstanding this, the court held that it would, and actually did, interfere to prevent the exercise of an unauthorized power.

The court below decides that the action of Contest Board is final and exclusive, and cites the Newcum case, the case of Batman v. Magowan, 1 Met., 533; Stine v. Berry, 96 Ky., 63; Anderson v. Likens, 20 Ky. Law Rep., 1004, and Booe

v. Kenner, 20 Ky. Law Rep., 1343. An investigation of these cases will show that they are not in conflict with the Newcum case and Commonwealth v. Jones, 10 Bush, 743.

In no one of those cases did it appear that the board had exceeded its jurisdiction. That, in the absence of any right to appeal, such decisions are final so long as the board confines itself to the jurisdiction conferred upon it there can be no question, but the moment it exercises jurisdiction in questions which are not by law submitted to it, that moment its decision becomes void, and may be collaterally attacked.

So said the court below in the Newcum case, and in Commonwealth v. Jones, 10 Bush, more than thirty years afterward, reaffirmed it. At page 743, in last-named case, the court said:

> "It is plain that the action of the board *within the limits of its jurisdiction* is final and conclusive as well upon the courts as upon the other departments of the government. But it is equally clear, and we do not understand the proposition to be questioned by the Commonwealth's counsel, that *when the courts are called upon to enforce the judgments of the board*, or to punish those who disobey its mandates, *they have the power to inquire into and determine as to its jurisdiction in the particular case in hand. Without jurisdiction to act the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world.* The cases of Batman v. Megowan (1 Met., 538) and Newcum v. Kirtley (13 B. Mon., 517) are perfectly consistent with this view. In Batman's case the question of the jurisdiction of the county contesting board was directly considered, and the mandamus refused upon the sole ground that the notice of contest had not been given within the time fixed by law, and, therefore, that the board had no jurisdiction to hear and determine the matter. And however anxious the Legislature may have been at and before the time of the decision in Kirtley's case to prevent the ordinary tribunals of justice from being harassed and possibly overwhelmed with the investigations, and involved in the

excitements to which contested election cases may be expected to give rise, that anxiety has ceased to exercise a controlling influence over legislation, and appeals from the decisions of county boards are now allowed to the Circuit Courts, and from these tribunals to this court.

"In view of the finality of the action of the Contesting Board in cases of State officers (which is exactly the same as that of the Legislature in this case), it is a matter of regret that its jurisdiction and powers are not more accurately and specifically defined by the statute."

Continuing, at page 749, the court says:

"This is not an erroneous judgment which can not be corrected on account of the want of power or jurisdiction in another tribunal to review it. *The board having no power to act in the premises, it is not a judgment at all.*"

In this connection the attention of the court is called to the case of Newcomb v. Newcomb, 13 Bush, in which the court below said:

"Other cases might be cited sustaining the doctrine that no one can be deprived of his personal or property rights without being first heard. Such a plain principle of natural justice requires no authority to support it."

They thus dispose of this argument:

"Section 16 of the Civil Code denies the defendant the right of an appeal to this court from the judgment granting a divorce. So the appellee in this case, by reason of the act of March 9, 1869, is denied the right to petition for a new trial, is denied the right (if a nonresident) to appear within five years and move to retry this case; and, by section 16 of the Code, has no appeal. When she appears in court, and by petition asks for a new trial, the law forbids it; when she asks an appeal it is denied her; and, lastly, when the judgment she desires to assail is interposed to divest her of what she claims to be her right of property, she is told that parol evidence is inadmissible.

to show that a domestic judgment is void. Can such a case be brought within the rule by reason of public policy, the defendant denied a hearing, the most important relation in life severed by means of a void judgment, and the party wronged be without remedy? In such a case the reasoning of the court in the case of Starbuck v. Murray might well apply. No rule will be allowed to violate every principle of natural justice by depriving the sane or insane of the rights of person or property without a hearing. Every one whose rights are to be effected by a judicial proceeding must have his day in court. This is one of the fundamentals of the law; and when a judgment has been rendered without citation or summons, there must be some remedy afforded the party complaining."

"The party defendant was not in court, but it is insisted by the counsel for the appellant that SHE WAS IN COURT BECAUSE the record says she was in court. This response might well be made if the appellee had her remedy by an appeal, or could by proper proceedings vacate the judgment. In such case the rule, that a judgment by a court having jurisdiction of the subject-matter and the parties, can not be attacked in a collateral proceeding, is made to apply, but where these remedies are all withheld from the defendant in an action for divorce by reason of the statute, it would be inconsistent with public interest and morals, as well as a palpable violation of the natural, legal and constitutional rights of the citizen to say, that a judicial tribunal could, by its judgment, sever the marital relation without notice to the parties in interest."

The argument of counsel for defendants in error, that there must be an end to litigation and that some tribunal must finally settle every controversy, is unquestionably correct; but no tribunal which exceeds its jurisdiction, or acts without jurisdiction; no tribunal that acts arbitrarily, or without authority, can settle or determine anything. The Constitution of the United States extends its protecting shield over the citizen and saves him from spoliation and tyranny.

This is an action to declare appellants usurpers, and to re-

cover from them the possession of the offices, papers, etc., etc. In order to recover in such an action the plaintiff must show a good title. (Hinton v. Leeman, 1 Duvall, 43; Howes v. Perry, 92 Ky., 13.)

And now, that the contestants seek the aid of the court to enforce their judgments, we clearly have the right to inquire whether or not the board acted within its jurisdiction as held in the Jones case, and whether or not plaintiffs have any title.

The court below, however, attempts to escape the effect of its previous opinions by saying that in the Jones case the board had found—

> "That Jones had accepted a challenge to fight a duel, and was, therefore, disqualified to hold an office. But as, under the Constitution, a conviction of the offense was necessary to disqualify Jones from holding office, this court disregarded the finding of the board, for the reason *that it related only to an immaterial matter.* In this case, however, the Legislature finds the part that determines the rights of the parties. There is nothing in their finding to show that the election was void."

With profound respect for the court below, we must be permitted to say the statement of the court, that the finding of the board was disregarded "for the reason that it related only to an immaterial matter," is neither fair nor in point of fact true. Upon the contrary, it was held that the finding of the board was upon a material matter—one which deprived the citizen of rights secured to him under the Constitutions of the State and Nation. The whole theory of the decision is that the board exercised a power not conferred upon it by law, and that, therefore, it acted without jurisdiction, and its decision could be collaterally attacked.

The statement that it does not appear in the *finding* that the election was void, and that, therefore, the court is powerless to act, can not be sustained in either law or morals. The notices of contest, which are the foundation of the exercise of jurisdiction, do not claim that the contestants received the highest number of legal votes, and a finding that such was the

case by the Legislature is entirely outside the notice. The notice shows upon its face that the finding is without authority, and essentially precludes the jurisdiction of the court. Nor is this all. The evidence shows conclusively that the finding was not, and could not have been, made on any of the enumerated grounds of the statute.

If it be true that the party complaining must be confined to the judgment on the contest, then such finding, if regular on its face, would deprive the citizen of his rights even though no notice had been given or no proof introduced.

But we are told that the journals of legislative bodies may not be impeached for fraud nor the motives of the Legislature be inquired into. There seems to be a contrariety of opinion on this question, but for the purposes of this investigation it is unnecessary to enter into any discussion.

Out of the many authorities cited by opposing counsel, not one holds that in a trial before a Legislature involving the rights, immunities, privileges and liberty of the citizen, its action may not be reviewed.

No attempt is made here to contradict or impeach *legislative* action. To allow the motives of the Legislature or its conduct to be inquired into in the passage of a statute, or in the discharge of a plainly legislative duty, might be said to result in endless litigation and the attacking by litigants of almost every statute enacted, and hence could not be allowed. But the determination of a contest, which has occurred but once in more than one hundred years, can not be said to open the gates of litigation indiscriminately.

It is said that the people have a remedy against any wrong inflicted by the Legislature. This may be true as to the passage of a statute, for the sovereign may elect representatives who will repeal it. But this doctrine has no application in the present case. It matters not how many Legislatures may be elected hereafter, they will be unable to undo the wrong inflicted, not only on the people, but on the parties directly in interest. Nor can the people, even though they shall so desire, elect Representatives who will repeal the present election law or prevent the recurrence of such an outrage. If the present

regime can now boldly defeat the will of the people with an election machine, they can continue to defeat their will in the future by employing the same methods. From such tyranny and fraud there can be no relief. Nor can any relief be afforded the injured parties to this controversy. If the action of the Contest Board is to remain in force they are deprived of their offices, their rights and immunities abridged, and their liberty invaded and violated. The doctrine, therefore, of legislative responsibility to the people and the power of the people to remedy legislative wrongs has no application to this case.

By analogy the cases of Jones v. Jones, 12 Pa. St., 350; Cronise v. Cronise, 54 Pa. St., 262-263, forcibly sustain our contention. The Constitution of Pennsylvania conferred power on the Legislature to grant divorces for causes other than those prescribed in the statutes.

The case of Jones v. Jones, supra, was an action of ejectment. The lands in controversy had descended to the wife, who was plaintiff. In order to sustain her title she introduced and read an act of the Pennsylvania Legislature, passed in 1845, divorcing her from her husband, Joseph P. Jones, but which did not state the cause for which the divorce was granted. The defendant then offered in evidence the record of an action for divorce in 1842 by the wife against him, in which a verdict had been rendered in his favor. The defendant also offered to prove that the petition of the wife, with certain affidavits and documents praying an act divorcing her from her husband, was presented to the Legislature by one of her counsel, who was at the time a member; and that the act of assembly was procured by fraud, falsehood and undue means, and without notice, and by misrepresentation of the member referred to. All this evidence of defendant was rejected, and error was assigned.

At the outset the court says:

> "But in this State the Legislature seems to have acted on the ground that it *was the exercise of a legislative power*, and, therefore, not requiring a judicial examina-

tion. We think, however, this doctrine may well be questioned."

Continuing, on the next page, the court says:

"The power confided to the Legislature is *a limited power*, and it can not be allowed that they should convert it into an unlimited power. If they can convert a special jurisdiction into a general jurisdiction, the provision of the Constitution becomes dead."

Again, the court says:

"It was, however, ruled in Kemp v. Kennedy that courts of limited jurisdiction must not only act within the scope of their authority, but that it must appear on the face of their proceedings that they did so, and if it does not so appear all their proceedings are *coran non judice*."

"But," says the learned judge, "I place the decision on the broad ground that the Constitution must be preserved, and that if courts should refuse to permit evidence to show the grounds of the divorce the Legislature could obliterate the clause in the Constitution."

The court accordingly held that it was competent to go behind the act to establish the ground upon which the divorce was granted, and that if it appeared that such ground was embraced in the statutes the act was unconstitutional.

In the case of Cronise v. Cronise, *supra*, the Jones case was reviewed and affirmed.

But there is a material difference in the sections of the Pennsylvania and Kentucky Constitutions. Originally the Constitution of Pennsylvania conferred unlimited authority on the Legislature to grant divorces. This, however, was changed and, the limitation stated adopted.

In Kentucky unlimited power was never conferred on the Legislature to determine contests. The only effect of the Constitution was not to confer power on the Legislature to determine contests, but the two Houses, in their entirety, were

elected as a Contest Board to determine the contests "according to such regulations as may be established by law."

Now when the determination is made the court has the undoubted right to inquire into the fact whether that determination is in accordance with such established regulations, and in order to do this has the power to investigate the entire proceeding. The limitation in election contests can not be made to appear in the judgment or determination relied upon because that determination does not show whether the rules were complied with, and of necessity can not pass upon the question as to whether or not they have been. The notice which is the basis of complaint must be looked into as well as the evidence, and the course pursued on the trial, when it is charged that each of them were in conflict with the statute, and that the party complaining has by reason of same, been denied a right guaranteed by the Federal Constitution.

In Cooley's Constitutional Limitations the learned author, after showing that the record of a court of general jurisdiction may not be contradicted, says:

> "But in the case of a court of special and limited authority it is permitted to go still further and to show a want of jurisdiction *even in opposition to the recitals contained in the record.*" (Star page 407.)

Under this plain and familiar rule it is contended that even parol proof may be heard to show that the Legislature, as a Contest Board, did not have jurisdiction to determine this case. And if this may be done, this court surely has the right to take into consideration the evidence before it to determine the same question.

To say that this unwarranted action of a legislative body is above and beyond control is to say that the citizen has no rights which it is bound to respect.

In Wilkinson v. Leland, 2 Peters, 627-657, Mr. Justice Story, speaking for this court, said:

> "That government can scarcely be deemed to be free

where the rights of property are left solely dependent upon the will of a legislative body, without restraint. The fundamental maxims of free government seem to require that the rights of personal liberty and private property shall be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people."

No State Constitution or statute can place legislative action beyond the investigation of courts, nor can the Legislature, by any enactment, place the acts of its agents or servants beyond judicial inquiry.

This court, in Smyth v. Ames, 169 U. S., 466, through Mr. Justice Harlan, held that while the General Assembly of a State has the right to establish maximum rates for transportation of passengers and freights on railroads in such State, that such rates when unreasonable can not be enforced, and that the corporation affected has the right to appeal to the United States Circuit Courts under the section of the Constitution which prevents deprivation of life, liberty or property without due process of law; and that the State can not conclusively determine by its Legislature, or regulations adopted under its authority, such matters so that they may become fixed and beyond the subject of judicial inquiry.

In 1887 the Legislature of Minnesota approved a statute establishing a railroad commmission which was interpreted by the Supreme Court of that State as providing that the rates of charges adopted by the commission should be final and conclusive, and that there could be no judicial inquiry as to their reasonableness. This court held, through Mr. Justice Field, that the act was in conflict with the Constitution of the United States as depriving the company of its property without due process of law, and of the equal protection of the laws, and that the State could not by legislative act sanctify or make legal such a deprivation, or place it beyond judicial investiga-

tion. (See C., M. & St. Paul Ry. Co. v. Minnesota, 134 U. S., 418.)

Before leaving this branch of the discussion I must be permitted to say that I have not that deep reverence and deferential respect for the legislative department which the court below entertains. The legislative department is the most dangerous and uncertain of all the departments of government. By reason of its numbers, and its susceptibility to popular clamor, it is not properly constituted to try with coolness, caution or impartiality any case involving political ascendency. The very qualities which are essential in a court to protect the citizen in his rights, irrespectively of public or political excitement, are sadly wanting in a legislative body. The Legislature is fresh from the contests attending exciting elections and quite inclined, under the most favorable circumstances, to suspect the motives of those who differ with them, and to resort to measures of doubtful propriety in order to secure party ends. (Cooley's Constitutional Limitations, star pages 261-262.)

> "The judiciary is incomparably the weakest of either of the departments. The legislature has a controlling influence over the executive power, since it holds, at its own command, all the resources by which a chief magistrate could make himself formidable. It possesses the power over the purse and the property of the people. It can grant or withhold supplies, it can levy or withdraw taxes, it can unnerve the power of the sword by striking down the arm which wields it." (Story on Const., section 531.)

Well has DeLome, in his book on the English Constitution, in speaking of the legislative department (Book 2, chapter 3), said:

> "It is without doubt absolutely necessary for securing the Constitution of a State, to restrain the executive power. But is still more necessary to restrain the Legislature. What the former can do by successive steps (I mean subvert the laws), and through a longer or shorter train of enterprises, the latter does, in a moment, as its bare will can give

being to laws, so its bare will can also annihilate them. * * * In order, therefore, to insure stability to the Constitution of a State, it is indispensably necessary to restrain the legislative authority."

"The truth is," says Judge Story—

"That the legislative power is the great and overruling power in every free government. It has been remarked, with equal power and sagacity, that the legislative power is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." (Story on Const., Section 532.)

In a representative republic, where the executive is carefully limited, both in the extent and duration of its power, and where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; and which is sufficiently numerous to feel all the passions which actuate the multitude: yet so numerous, as to be incapable of pursuing the objects of its passions by means which reason prescribe; it is easy to see, that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department, that the people may well indulge all their jealousy and exhaust all their precautions. (Federalist, Nos. 48 and 49.)

Instead of standing with uncovered head before this department, rather should the judiciary scan with greatest care its comparatively irresponsible and reckless action. Decent respect for its action may be proper, but "bending the pregnant hinges of the knee," should never characterize the action of the judiciary, especially when called upon to protect the rights, the liberty or property of the citizen from arbitrary power. Of all the departments of government it should be the most thoroughly independent, for in it lies, at last, the greatest security of the citizen.

XV. DETERMINATION VOID IF PURELY LEGISLATIVE.

If the Legislature acted purely as a law-making power and is entitled, therefore, to immunity from investigation as to its

jurisdiction, it follows, from the facts attending that action, that its whole proceeding is void.

* * * * *

Section 89, State Constitution, requires:

"Every order, resolution or vote, in which the concurrence of both Houses may be necessary, except on a question of adjournment, or as otherwise provided in this Constitution, shall be presented to the Governor, and, *before it shall take effect*, be approved by him, or being disapproved, shall be repassed *by a majority of the members elected to both Houses* according to the rules and limitations prescribed in case of a bill."

This section of the Constitution is mandatory. No act or resolution can become a law unless the Governor is at least permitted the opportunity of signing the same. His signature or refusal to sign overruled by a majority of the members elected, is as necessary as the signature of the Speaker or presiding officer of either body. Under Rule 11, adopted by the General Assembly, which is clearly unconstitutional, because the object of the same was to avoid the constitutional requirement that contested elections should be decided by BOTH Houses, it was undertaken to create a joint session of the two bodies, and such joint session, it is claimed, did in fact meet under the same, and the resolution approving the judgment of the Board of Contest was by such joint session approved. This action was void. But it is necessary under the Constitution that each House should concur in this resolution in order to make it effective, and it, therefore, comes directly within the requirements of section 89, State Constitution.

It may be said that it was not necessary to submit this resolution to Governor Taylor, because of the fact that he had an interest in the same and most probably would have refused to approve it. Defendants in error did not think it improper for members of the Contest Board to act who were interested, nor for Senator Goebel to act on the Committee on Rules in procuring the adoption of a rule which violated the Constitution, but become greatly excited when told that Governor Taylor must have had the resolution presented to him. Unfortunately for

them the Constitution expressly declares that it "shall have no effect" until presented to the Governor. Whether he had an interest or not, it was his duty to approve it, if he believed, under the Constitution and laws, that it was proper; and it was likewise his duty to disapprove it if he felt that it was not constitutional. He could not have more than refused to approve it by veto or failure to sign within the constitutional limit. In the latter state of case, it would have become the law, and in the former, it should have been passed over his veto in order to make it effectual. As stated, this question is before this court, for it is only another instance in which due process of law has been denied.

CONCLUSION.

If the judgment below is affirmed, or the appeal dismissed, then indeed is the Commonwealth of Kentucky in a most pitiable condition. Claiming to be one of the States of the Union, she stands robbed of her right to choose her own rulers, and presided over by usurpers who drag at their chariot wheels her downtrodden people. Though one of the stars of the national firmament her light may not be seen through the impenetrable veil of tyranny which envelopes her. She has appealed to her own courts, but they have declined to give her relief. An appeal to the ballot box would be futile for the same power which so recently defeated the sovereign will, being emboldened by success and drunken with increased powers, even more readily, and mercilessly repeat the unspeakable outrage.

What are all our boasted privileges worth? What our bill of rights, though it may have been written in the blood of soldiers who died upon the battlefield or martyrs who perished in loathsome dungeons, if their limitations upon arbitrary power are to be ignored with impunity by the very agencies set apart to guard and enforce them?

In such an extremity, We make the last ~~peaceful~~ appeal to the highest court of the land, a tribunal, which, in the past, while others have been more or less controlled by the partisan

excitement of the hour, has calmly and self-poised risen above the storm, looking beyond at the eternal principles of justice, which should govern the affairs of men.

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CITATION OF AUTHORITIES.

1st. Jurisdiction of Supreme Court—

Section 90, Constitution of Kentucky.
Secton 709, Revised Statutes U. S.
Page v. Hardin, 8 B. Mon., 672.
Commonwealth v. Jones, 10 Bush, 735.
Standeford v. Wingate, 2 Duvall, 445.
Bailey v. Commonwealth, 81 Ky., 401-2.
In Re Sawyer, 124 U. S., 210-212-220.
Kennard v. Louisiana, 92 U. S., 480.
Foster v. Kansas, 112 U. S., 201.
Wilson v. North Carolina, 169 U. S., 594.
Munn v. Illinois, 94 U. S., 123.
Cromwell v. Randall, 10 Peters, 398.
Gray v. Coan, 154 U. S., 588.
Bridge Proprietors v. Hoboken Co., 1 Wall, 116-148.
Choteau v. Gibson, 111 U. S., 200.
Murdock v. Memphis, 20 Wall., 590-636.
Brown v. Colorado, 106 U. S., 95-97.
Detroit Railway Co. v. Guthard, 114 U. S., 135.
Byrne v. Missouri, 8 Peters, 42.
Clark v. Pennsylvania, 128 U. S., 397.
San Francisco v. Itsell, 138 U. S., 66.
Ills. C. R. Co. v. Chicago, Opinion U. S. S. Court, March 12, 1900.
Cohen v. Virginia, 6 Wheat, 381, 404.
Luther v. Bordan, 7 Howard.
Scott v. McNeal, 154 U. S., 45.
Huntington v. Attrill, 146 U. S., 657-683-684.
Mobile & Ohio R. R. v. Tennessee, 153 U. S., 486-492 to 495.

2d. Due Process of Law—

Scott v. McNeal, 154 U. S., 34-45-46.
14th Article Amendment, Constitution U. S.
Virginia v. Rives, 100 U. S., 313-318.

Ex parte Virginia, 100 U. S., 339-346.
Neal v. Delaware, 103 U. S., 370-397.
U. S. v. Cruikshank, 92 U. S., 542, 554.
Bank Columbia v. Okely, 4 Wheat, 235-244.
C B. & Q. R. R. Co. v. Chicago, 166 U. S., 84.
Yick Wo. v. Hopkins, 118 U. S., 378.
Hovey v. Elliott, 167 U. S., 418-444-445.
Galpin v. Page, 18 Wall., 350.
Adams v. Postal T. Co., 155 U. S., 689-698.
Windsor v. McVeigh, 93 U. S., 272-278.
Potter's Dwarris on State and Const., 437.
Leeper v. Texas, 139 U. S., 462-68.
Henderson v. Mayor of New York, 92 U. S., 259.
Chy Lung v. Freeman, 92 U. S., 275.
Ex parte Virginia, 100 U. S., 339.
Neal v. Delaware, 103 U. S., 370.
Soon Hing v. Crowley, 113 U. S., 703.
Poindexter v. Greenhow, 114 U. S., 295.
Smyth v. Ames, 169 U. S., 466.
C., M. & St. Paul R. Co. v. Minnesota, 134 U. S., 418.

SUBDIVISION 1—THE LEGISLATURE HAS NO JURISDICTION.

Potter's Dwarris on Statutes and Constitutions, 338-339-342.
Kentucky Statutes (Ed. of 1899), section 1535, and section 8, Goebel Law, page 650.
Leeman v. Hinton, 1 Duvall, 38-40-45.
Newcum v. Kirtley, 13 B. Mon., 522-3.
Wilson v. Hines, 99 Ky., 221.
Kentucky Statutes, section 2566.
Acts (Ky.), 1850-1851, page 92.
Acts (Ky.), 1891-2-3, page 219.
Hocker v. Pendleton, 100 Ky., 726.
Commonwealth v. Jones, 10 Bush, 743-749-751-752.
Cooley's Const. Lim., star pages 168, 410, 411, 605, 607, 616, 620, 621, 625.
Nall v. Tinsley, 21 Ky. Law Rep., 1172.

Constitution of Kentucky, sections 1, 2, 6, 14, 86, 70, 89.
Howes v. Perry, 92 Ky., 260.
People v. Saloman, 46 Ills., 415.
Kentucky Statutes, section 1482.
Struss v. Johnson, 100 Ky., 319.
Anderson v. Likens, Ky. Law Rep., Vol. 20, page 1001.
Rainey v. Ratcliffe, 81 Ky., 468.
Grinstead v. Scott, 82 Ky., 88.
Lunsford v. Culton, 15 Ky. Law Rep., 504.
Works on Courts and Jurisdiction, 31.
Well's Jurisdiction, section 4.
Hovey v. Elliott, 167 U. S., 444-445.
Galpin v. Page, 18 Wall., 350.
Adams v. Postal T. C. Co., 155 U. S., 689-698.
Windsor v. McVeigh, 93 U. S., 277-278.
Story on Const., section 520.
Mechem on Pub. Officers, section 531.
Auditor v. Cochran, 7 Bush, 1.
Schaefer v. Gates, 2 B. Mon., 457.
3d Const. Ky., section 18, article 2, and section 28, article 2.
Yick Wo v. Hopkins, 118 U. S., 373-4.
Cooley's Const. Lim., star page 407.

SUBDIVISION 2—LEGISLATURE IS NOT ABOVE JUDICIAL REVIEW.

Cohens v. Virginia, 6 Wheat, 381.
Newcum v. Kirtley, 13 B. Mon., 524.
Batman v. Magowan, 1 Met., 533.
Stine v. Berry, 96 Ky., 63.
Anderson v. Likens, 20 Ky. Law Rep., 1004.
Booe v. Kenner, 20 Ky. Law Rep., 1343.
Commonwealth v. Jones, 10 Bush, 743-749.
Jones v. Jones, 12 Pa. St., 350.
Cronise v. Cronise, 54 Pa. St., 262-263.
Cooley's Const. Lim., star page, 261, 262, 407.

Wilkinson v. Leland, 2 Peters, 627-657.
Smyth v. Ames, 169 U. S., 466.
C., M. & St. Paul R. Co. v. Minnesota, 134 U. S., 418.
Story on Const., section 531, 532.
DeLome on Eng. Consts., chapter 3, book 2.
Newcomb v. Newcomb, 13 Bush.

SUPPLEMENTAL BRIEF.

Through oversight the printer omitted the following pages of brief; which omission was not discovered until after the brief had been completed and partially printed. Hence the court is respectfully requested to allow same to be filed as a supplemental brief.

2. Jurisdiction of this Court.

But this court has jurisdiction for another reason. The answer of defendants in error presents directly the question that section 4 of article 4 of the Federal Constitution has been violated, and the decision of the court below by necessary effect decides to the contrary (vol. 1, Rec., p. 15).

The people of each of the colonies evidently believed that they had the right of revolution, and demonstrated that belief by resorting to arms and gaining the independence which today blesses many of the States of the Union, but which does not and cannot exist in Kentucky as long as the judgment appealed from remains in full force.

After the adoption of the Articles of Confederation, when the States, through their delegates, met in convention and formed the Constitution, they declared in the preamble thereof that it was adopted "to form a more perfect union, establish justice, *insure domestic tranquillity*, provide for the common defense, promote the general welfare, and secure the blessings of liberty."

In the fourth section of article 4 it was provided:

"*The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature*

or of the executive (when the legislature cannot be convened), *against domestic violence.*"

In the forming of that instrument the States surrendered many rights to the Nation, agreeing to give it their support in every substantial manner. In return the Nation guaranteed protection against domestic violence and a republican form of government to each of the States. While the God-given right of revolution, as against the national Government—should such circumstances arise as would justify it—the States surrendered to the nation the right of revolution as against their own authorities, and accepted its covenant not only to maintain their domestic tranquillity, but their republican form of government. This guarantee is without condition; it is absolute. We ask, first, what is intended by "a republican *form* of government?" Does it refer to the outline or to the substance? If to the former, it signifies nothing. The word "form" is employed to distinguish the government named from other governments.

Now, how is this guarantee to be made good? In case of actual hostilities the President may interfere, and if there be dual governments, in so doing may recognize one of them as the republican form of government; or if there be two governments, each claiming to be the true government and actual hostilities do not exist, Congress may determine which is the proper government. But suppose there is but one government, as in this case, where the legislature has usurped the powers of the executive, and by the passage of a corrupt law, the object and result of which was without reason or justice, to deprive the citizens of their votes, when under the constitutions, both State and Federal, they are entitled to vote, or has arbitrarily under such law deprived them from choosing their rulers, and there is no domestic violence, how is the guarantee to be enforced? The President has no right to interfere. Congress is not the proper authority in such a case to act. Then

what department of Government can act? If not the judiciary, there can be no relief. Surely the framers of the Constitution never intended such a result. Every power of the Government may be called into action to guarantee this solemn promise, the power acting to be governed by the status of each particular case.

The will of the majority is the life of republican government. That will can alone be manifested through the elective franchise. And if, after this has been done and the persons chosen deprived of their offices by the arbitrary action of a legislature, can it be said that a republican form of government exists?

Or, conceding the contention of defendants in error to be true, that at least forty-five thousand freemen have been disfranchised, without any fault of their own, in order to reach the result, can it be said that such a State has a republican form of government?

Said Mr. Chief Justice Fuller, speaking for this court, in Duncan *vs.* McCall, 139 U. S., 461:

"By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is *the right of the people to choose their own officers for governmental administration*, and pass their own laws in virtue of the legislative powers reposed in representative bodies, *whose legitimate acts* may be said to be those of the people themselves."

In these cases the plaintiffs in error do not represent their individual and official interests alone. They are here as the representatives of the people's will, expressed at the polls. They represent the dignity and power of the people, and should they fail, while they may lose an office, the people lose their sovereign power under the law of the land, and the nation demonstrates its inability to make good its pledge.